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No. 80-***

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PAGE AIRWAYS, INC., *et al.*,
Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 2, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Whether the unelaborated market definition criteria set forth in *Brown Shoe Co.* v. *United States* adequately instruct a jury (or a trial judge) on how to find a relevant market.
2. Whether treble damages under the antitrust laws can be awarded for business torts that have merely a potential effect on competition, or whether actual injury to competition must be shown.
3. Whether an appellate court can affirm a jury verdict when it cannot determine whether or not the jury relied on a correct rule of law.[1]

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[1] The following were parties to the proceeding in the Court of Appeals: Page Airways, Inc., Page Gulfstream, Inc., Douglas Juston, Ross C. Chapin, Edwin C. Hamilton, Associated Radio Service Company, and Associated Radio Company.

Except for the parties listed above, there are no additional parent corporations, partially owned subsidiaries, or affiliates of Page Airways, Inc. or its wholly owned subsidiary Page Gulfstream, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Page Airways, Inc., Page Gulfstream, Inc., Douglas Juston and Ross C. Chapin respectfully petition for a Writ of Certiorari to issue to the United States Court of Appeals for the Fifth Circuit to review that Court's Judgment and Opinion in *Associated Radio Service Co.* v. *Page Airways, Inc.*, No. 78-1179, entered on August 29, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix A of this petition and is reported at 624 F.2d 1342 and 1980-2 Trade Cases ¶ 63,512. The Memorandum Opinion and Judgment of the United States District Court for the Northern District of Texas, denying Petitioners' motion for judg-

ment notwithstanding the verdict with respect to Respondent Associated Radio Service Co. and entering judgment for Respondent for $9,048,210.00, appears in Appendix B of the petition but is not officially reported.[2] The Judgment of the Court of Appeals appears in Appendix C and the Order of the Court of Appeals denying Petitioners' Petition for Rehearing and Suggestion for Rehearing *en banc* appears in Appendix D.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals for the Fifth Circuit was entered on August 29, 1980. The timely Petition for Rehearing and Suggestion for Rehearing *en banc* were denied on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), reads in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), reads in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ."

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[2] Two earlier rulings on procedural matters in this case are reported at 414 F. Supp. 1088 (N.D. Tex. 1976), 1976-2 Trade Cases ¶ 60,971 and at 73 F.R.D. 633 (N.D. Tex. 1977), 1977-2 Trade Cases ¶ 61,742.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The $9 million judgment in this private antitrust case rests on jury instructions reflecting long-standing deficiencies in the approach to market definition, and on a uniquely inadequate test of competitive injury which converts the Sherman Act into a generalized treble-damage remedy for ordinary business torts.

(1) Statement of Facts

This dispute arose out of the termination of a business venture in which Petitioners Page Airways, Inc., its wholly owned subsidiary Page Gulfstream, Inc. (hereinafter collectively referred to as "Page") and Respondent Associated Radio Service Co. (hereinafter "Associated") outfitted private and business aircraft at a facility in San Antonio, Texas.

The business of outfitting aircraft consists of installing flight equipment ("avionics") and interiors in aircraft to make them suitable for use by their owners.[3] Outfitters work on commercial aircraft that are being con-

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[3] Avionics outfitting involves the installation of the electronic equipment, including flight control, navigation, and communication subsystems, in the aircraft. Installation of interiors includes the design and installation of the seats, carpeting, and other items in the aircraft cabin.

verted to private use, as well as on "green"[4] aircraft delivered new from the factory. Today some twenty major outfitters in this country and a few in Europe outfit a variety of private aircraft. *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d at 1344-45; App. A at 2a.

Respondent Associated has been in the aircraft outfitting business under various names and with assorted business associates since 1948. In 1968, Associated opened its own complete aircraft outfitting facility in Dallas, Texas, which it continues to operate today, installing both avionics and interiors in various aircraft. 624 F.2d at 1345; App. A at 3a.

In 1967, Petitioner Page was asked by Grumman Corporation to become a distributor of the Grumman Gulfstream II (G-II) and to establish an outfitting facility in the southwest part of the country. Page thereupon entered a five-year agreement with Associated, taking effect in 1968, under which Page would contract to sell outfitted G-II's to business customers and Associated, as a subcontractor, would install the avionics equipment specified by the customers. The work would be performed in an outfitting facility in San Antonio, Texas. Interior installation, originally to be performed by a third party, was soon taken over by a new enterprise jointly operated by Page and Associated. *Id.* at 1345-46; App. A at 4a.

By June 1972, Page notified Associated of its intention not to renew the agreement when it expired in June 1973—a decision that was admittedly lawful—and began plans to establish its own outfitting facility. *Id.* at 1347; App. A at 6a. Disputes between the parties arose as the joint operation in San Antonio was being shut down.[5]

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[4] Green aircraft are those new planes which are sold to customers without completed avionics and interior furnishing.

[5] Associated continued to operate its Dallas facility, installing both avionics and interiors in a variety of aircraft, including some G-II's. *Id.* at 1345-47; App. A at 8a.

Finally, Associated brought this antitrust damage action. *Id.* at 1348; App. A at 8a.

(2) District Court Proceedings

Respondent Associated originally filed its complaint in this case in October, 1973, in the United States District Court for the Northern District of Texas. After an initial amendment, the complaint was dismissed with leave to amend. On June 25, 1975, Associated filed a second complaint, charging that Page Airways, Inc., its wholly owned subsidiary Page Gulfstream, Inc., and several employees of Associated and Page had conspired to eliminate Respondent as a competitor in the installation of avionics in the Grumman G-II's and had thereby violated Sections 1 and 2 of the Sherman Act. The Defendants were alleged to have "pirated" Associated's employees, stolen trade secrets, slandered Associated's credit, brought false lawsuits, engaged in commercial bribery, and used income tax evasion to strengthen Page's competitive position.[6] *Id.* at 1347-48; App. A at 8a-9a.

A jury trial commenced on June 6, 1977, continued for 11 weeks, and involved some 50 witnesses, 600 exhibits, and 9,000 pages of testimony. The evidence proffered by Associated related largely to Petitioners' alleged bad acts.[7] Associated offered no testimony from customers

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[6] Filing the suit with Associated was its principal supplier of avionics equipment, Associated Radio Company. The District Court found that the supplier had no standing to sue Petitioners and entered judgment notwithstanding the verdict. App. B at 42a-43a. The Court of Appeals affirmed. 624 F.2d at 1362-63; App. A at 39a-40a. Petitioners of course are not seeking to review that judgment.

[7] Petitioners had unsuccessfully sought to protect themselves from the introduction of prejudicial and irrelevant evidence by moving to dismiss or exclude inflammatory allegations and testimony. These motions related, *inter alia*, to Petitioners' alleged

or suppliers in the aircraft outfitting business (other than Associated itself), nor from experts who had studied the business. Petitioners unsuccessfully moved for a directed verdict on the grounds, *inter alia*, that the evidence dictated a broader market definition than the narrow definition proposed by Respondent, that Respondent had shown at most injury to itself but had shown no injury to competition, and that the evidence was insufficient to prove that Petitioners attempted to monopolize or actually monopolized any relevant market, regardless of how narrowly defined. *Id.* at 1348, 1350, 1354; App. A at 10a, 12a-13a, 21a; CA App. at 2362-2382, 2538-2557.

Both before and after the close of trial, Petitioners proposed jury instructions that attempted to relate the facts of the case to the market definition issue. CA App. at 2391-93, 2518-27. The District Court, however, concluded that the effort "to relate the facts to the law in this case [had] resulted in either confusion or unfairness," CA App. at 2582, and abandoned the effort. Its instructions to the jury on the critical issue of market definition were little more than an abstract statement of criteria listed in this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). 624 F.2d at 1349-50, n.12; App. A at 11a-12a.

Petitioners also proposed special interrogatories directing the jury to determine whether each of the alleged acts of unfair competition actually had occurred and, if so, whether it had had an adverse effect on competition. CA App. at 2472-94. The District Court, however, rejected the interrogatories and charged the jury that each of the alleged bad acts, if found, was evidence in support of the antitrust claims, that it need not find a specific injury, and that it had to find only that the conduct tended to restrict competition or to prejudice the public

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bribery of foreign officials, their alleged misuse of judicial process, and their alleged failure to pay income tax. *See* Joint Appendix in Court of Appeals (hereinafter "CA App.") at 2274 and 2304.

interest. 624 F.2d at 1353, n.20 and 1358, n.27; App. A at 20a and 31a.

After brief deliberation, the jury returned a verdict in favor of Respondent. It found that the relevant market was the sale and installation of avionics equipment in Grumman G-II's only, that Petitioners had combined, conspired, or agreed to restrain trade unreasonably in violation of Section 1, and that Petitioners had monopolized, attempted to monopolize, or conspired to monopolize the installation of avionics equipment in Grumman G-II's. It awarded $2,750,000 in damages to Associated Radio Service Company and $550,000 to Associated Radio Company. 624 F.2d at 1348; App. A at 9a.

The trial judge, in his Memorandum Order and Judgment of October 7, 1977, denied Petitioners' motion for judgment notwithstanding the verdict with respect to Respondent Associated Radio Service Company and awarded treble damages of $8,250,000.00, attorneys' fees of $757,424.00, and expenses of $40,876.00. App. B at 43a-46a, 48a. The judge found that Associated Radio Company, the supplier of Associated, had no standing to sue Petitioners for lost business and entered a judgment for Petitioners notwithstanding the jury verdict for the supplier. App. B at 42a-43a. Petitioners' motion for a new trial was denied on November 21, 1977. CA App. at 2622, 2675.

(3) The Court of Appeals Decision

The Court of Appeals for the Fifth Circuit affirmed the judgment against Petitioners. The Court found sufficient evidence to support the jury's narrow market definition. It also held that the jury charge on the market definition issue was "clear" despite the fact that it simply repeated a list of potentially relevant factors, without explanation and without indicating the significance of the conflicting positions of the parties with respect to outfitters' ability to move from one aircraft model to another. 624 F.2d at 1348-50; App. A at 9a-12a.

Turning to the Section 1 violation, the Court set forth a new two-part test for determining when acts of unfair competition and other business torts violate Section 1 of the Sherman Act. Neither part of its test requires a showing of actual competitive injury; instead, the test allows a jury to find liability if the plaintiff succeeds in showing "(1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." *Id.* at 1351; App. A at 16a. Applying the newly announced test, the Court concluded that the jury instructions, requiring only that the defendant's conduct have a tendency to injure competition or to prejudice the public interest, were "adequate," and that there was enough evidence to satisfy the test in this case. *Id.* at 1351-53; App. A at 16a-20a.

Finally, the Court upheld the jury's finding of a Section 2 violation. It found that Page's share of the supposed G-II avionics market was significant enough to support a Section 2 charge and that the collection of alleged bad acts was sufficient to show a "pattern of exclusionary behavior" in violation of Section 2. *Id.* at 1353-57; App. A at 21a-30a.[8]

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[8] Because the Court held that *"all* of this conduct, taken together, rose to the level of a section 2 violation and . . . isolated acts, standing alone, did not," and because Hamilton, one of the defendants, had been accused of engaging in only a few of the bad acts, the Court of Appeals reversed the judgment against Hamilton. 624 F.2d at 1363; App. A at 40a-41a (emphasis in original).

Petitioners had also challenged the substantial $9 million damage award on a number of grounds, including the fact that the jury was never told to distinguish between Associated's losses arising from the lawful termination of the subcontract relationship and those arising from the alleged tortious acts. The Court of Appeals nevertheless accepted the damage figure on the assumption that, since the jury was aware of the termination of the subcontract relationship, it must have considered it and must have decided that, despite the termination and new competition from Page, Associated would have gotten the same share of G-II outfitting contracts that it previously had gotten through Page. *Id.* at 1361-62; App. A at 38a-39a.

REASONS FOR GRANTING THE WRIT

I. THE CASE INVOLVES FUNDAMENTAL ERRORS IN THE APPROACH TO MARKET DEFINITION THAT HAVE BEEN WIDESPREAD AND REQUIRE CORRECTION BY THIS COURT

Market definition is critical if not decisive in a wide range of antitrust cases, including all merger cases and all Sherman Act cases in which market power or actual injury to competition must be shown. It is therefore vitally important to a rational disposition of such cases that markets be defined as accurately and sensibly as economic analysis and practical constraints permit.

While in many cases the factual issues are complex and ultimate resolution difficult, the basic elements of a correct approach to market definition are not obscure. Yet they are widely misperceived or disregarded. Market definition, both in jury and non-jury cases, has been one of the least satisfactory and most severely criticized areas of antitrust law.[9] In many cases,

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[9] As Professor Handler has observed:

> "The threshold inquiry in any merger or monopoly case is the delineation of the relevant market. If the market is incorrectly defined, we can anticipate that the result will usually be likewise erroneous. The error can stem either from a market determination that is too broad or one that is to narrow. Unfortunately, market delineation from the very outset of section 7 litigation has degenerated into a game. The process of gerrymandering does no credit either to bench or bar."

Handler, "Twenty-Five Years of Antitrust," 73 COLUM. L. REV. 415, 453 (1973).

To similar effect is Professor Posner's opinion that "[m]arket definition is . . . conceptually straightforward, but it has been badly handled by the courts." R. POSNER, ANTITRUST LAW 127 (1976).

See also Note, "The Role of Supply Substitutability in Defining the Relevant Product Market," 65 VA. L. REV. 129, 130 (1979):

market definitions have bordered on the ludicrous—occasionally overly broad, more commonly overly narrow.[10]

Much if not most of the difficulty is attributable to a widespread failure to go beyond general, unelaborated language in this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and to the fact that the Court has not found an occasion in the intervening nineteen years to reformulate and supplement *Brown Shoe*'s description of the market definition process.[11] The problem is not that the *Brown Shoe* criteria

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"Opinions on questions of relevant market have been confusing, as market definitions have varied from broad to narrow, seemingly with no logical consistency. The case law's haphazard delineations of markets and submarkets have failed to provide an analytically sound framework upon which firms can rely in planning mergers and other business strategies."

[10] *E.g.*, *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (Treble damages for attempting to monopolize a market consisting of retail photoprocessing available through drive-thru kiosks, excluding retail photoprocessing available through any other outlets, such as drugstores, supermarkets, etc.); *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269 (8th Cir.) *cert. denied*, 414 U.S. 1032 (1973) (Jury verdict of treble damages for attempting to monopolize the market for making soft grit abrasive (SGA) out of black walnut and apricot pit shells, excluding SGA made from other materials, such as sawdust, rice hulls, corn cobs and clover seeds. The Court of Appeals reversed for failure to prove a dangerous probability of achieving a monopoly but did not reject the market definition); *United States* v. *Blue Bell, Inc.*, 395 F. Supp. 538, 542-51 (M.D. Tenn. 1975) (The relevant product market is the sale of work clothes to industrial rental laundries that rent the work clothes to industries and are unaffiliated with a manufacturer of work clothes and does not include sales directly to industries or sales to industrial rental laundries that are affiliated with a manufacturer of work clothes.)

[11] The Court in *Brown Shoe* held:

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes

are wrong or that *Brown Shoe* was not a useful advance. The criteria are all relevant. Rather, the basic problem is that *Brown Shoe*'s undifferentiated listing of criteria does not provide adequate or proper guidance to a fact-finder, especially in jury cases.

This case, involving jury instructions that did little more than track *Brown Shoe*'s language, is an appropriate and timely opportunity for this Court to help rationalize the process of market definition. These instructions are not atypical. The problems they raise are serious and will continue unless addressed. These very instructions (and functionally similar ones) have been reproduced in the ABA's collection of sample jury instructions for antitrust cases.[12]

Moreover, the issues raised by the instructions in this case, while basic, are relatively simple and can be determined without this Court's having to resolve any factual disputes. They relate to the adequacy of the jury instruc-

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for it.[42] However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." 370 U.S. at 325 (citations omitted).

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[42] The cross-elasticity of production facilities may also be an important factor in defining a product market. . . .

[12] ABA ANTITRUST SECTION, ANTITRUST CIVIL JURY INSTRUCTIONS 127 (1980).

tions themselves, not to the sufficiency of the evidence. The issues are three-fold:

1. Jury instructions that simply recite *Brown Shoe*'s list of factors relevant to market definition—with no explanation as to their meaning or relative significance and no guidance as to how they are to be applied—are legally insufficient.

2. Juries should not be told that market definition can be arrived at by merely counting the factors pointing toward or against a separate market. The basic issues in product market definition are user substitutability (do buyers consider the products close substitutes) and supplier substitutability (can suppliers produce the products interchangeably). Other "relevant factors" are simply evidence on these two basic issues, and their significance varies considerably.

3. An instruction that merely tells the jury that either a "market" or a "submarket" may be the relevant market is inadequate and misleading. The relevance of the "market/submarket" distinction made in *Brown Shoe* needs at least to be more precisely defined. While a case may indeed involve more than one relevant market, there cannot ordinarily be both a clearly defined market and an "economically significant submarket" *within* that market. If buyer or supplier substitutability indicates strongly that products A and B are in the same market, market shares derived from an A "submarket" or a B "submarket" will at best greatly misstate the competitive significance of a merger or other conduct and may be virtually meaningless.[13]

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[13] The shares of the "submarket" will overstate the significance of, say, a merger between two firms that produce only product A (or B), since competition from producers of B (or A) is totally disregarded. The "submarket" shares will understate the significance of a merger between an A producer and a B producer, as the share of each will be zero in the other "submarket," implying no horizontal merger effects at all.

A. The Jury Instructions in This Case, Which Did Little More Than Track the Language in *Brown Shoe Co.* v. *United States*, Were Insufficient and Misleading.

The underlying market definition question raised at the trial was whether the relevant market should be narrowly defined as the installation of avionics in G-II aircraft models only, or more broadly defined as the outfitting of turbine-powered business aircraft generally. The central issue was supplier substitutability—whether or not established outfitters can easily shift from one aircraft model to another. It may be assumed that user substitutability was not a significant issue—the owner of a G-II aircraft needs an avionics and interior configuration suitable to a G-II. Nevertheless, as many cases and commentators have recognized, lack of user substitutability does not dictate separate markets if the products are produced by common facilities and the producers can and do readily shift their resources from one product to the other in response to changing demands.[14]

Defendants below introduced evidence that in the outfitting industry the technology, facilities, basic tools and skills, avionics and other materials used in outfitting various turbine-powered business aircraft are the same; and that most of the established outfitters hold themselves out as being able to outfit a variety of aircraft, do in fact outfit a variety of aircraft, and readily move from one type to another.[15] Plaintiff company is among

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[14] *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 510 (1948); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975); *Telex Corp.* v. *IBM Corp.*, 510 F.2d 894, 914-19 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *In re Budd Co.*, 86 F.T.C. 518 (1975). *See* P. AREEDA & D. TURNER, II ANTITRUST LAW ¶ 526 (1978); R. POSNER, ANTITRUST LAW, 127-29 (1976).

[15] 624 F.2d at 1349, n.11; App. A at 10a-11a; CA App. 1486-88, 1502-03, 1724-43, 1848-50, 3467.

those, and testimony from some of the Plaintiffs' own witnesses supported the proposition that the business is broader than the outfitting of any one model.[16] Plaintiff, on the other hand, introduced evidence that shifting to a G-II installation involves start-up costs in procuring the necessary Supplemental Type Certificates[17] and in surmounting the "learning curve," and that outfitters tend to specialize in a particular aircraft type at any given time.[18]

Page moved for a directed verdict on the market issue. That motion denied, Page sought market definition instructions that would relate the law to the facts at issue in the case. Page particularly sought such an instruction with regard to the central issue in the case —whether outfitters, because of their ability to shift from one aircraft to another, should be deemed to be in a market of outfitting turbine-powered business aircraft generally. Instead, the District Court, in its charge to the jury on the market definition issue, simply stated Plaintiffs' and Defendants' conflicting definitions of the relevant market, listed the *Brown Shoe* criteria, and added the following:

> "No one factor is necessarily decisive, but the more of these criteria that the particular relevant market fulfills, the more likely it is a separate product/service market.

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[16] CA App. 110-11, 686-90, 698, 725-26, 1110-11.

[17] These certificates warrant that the avionics installation in a particular plane meets Federal Aviation Administration standards.

[18] The evidence cited by the Court of Appeals that it took "up to $3,000,000 and two and one-half years to enter the G-II avionics installation market," 624 F.2d at 1349, n.11; App. A at 10a-11a, plainly referred to the cost of creating a complete new facility, not the cost of switching existing facilities from the outfitting of other aircraft to the outfitting of G-II's. CA App. at 36-37, 1008-10.

> For the purpose of this case, it is immaterial whether you find from a preponderance of the evidence that the relevant market is a market or a submarket. The relevant market may be either a market or a submarket." 624 F.2d at 1349, n.12; App. A at 11a-12a.

The District Court rejected Page's objections to this charge, including the objection that it was "wholly meaningless and confusing in that it fails to define the considerations which go into determining the relevant market in any way which may be understood by the jury." CA App. at 2573.

On appeal, in addition to arguing that there should have been a directed verdict on the market issue, Page again urged that the charge to the jury was insufficient and misleading. In upholding the jury verdict, the Court of Appeals disposed of Page's objections as follows:

> "We think there was ample evidence of high entry barriers and of the difficulty outfitters encountered in switching back and forth from one model of aircraft to the next to allow the jury to find a relatively narrow market. The court's charge on this issue was clear and spelled out the relevant factors for the jury to consider, and we therefore hold that the jury's factual finding regarding Associated's claim is supported by the evidence." 624 F.2d at 1349-50; App. A at 10a-12a (footnotes omitted).

But the instructions were neither "clear" nor correct on the crucial issue of the weight to be given the various "relevant factors" and the factual evidence bearing on them. Under the charge given it, the jury could have believed Page's evidence showing that outfitters could and did move easily from one aircraft model to another, rather than the evidence cited by the Court, and still have found a narrow G-II market on the basis of "the product's and/or services peculiar characteristics and uses," "distinct prices," and "distinct customers"—either

under the misleading instruction that "the more of these criteria that the particular relevant market fulfills, the more likely it is a separate . . . market," or in the belief, which the instructions did not dispel, that even though outfitter mobility clearly pointed to a general outfitting market, other criteria could be taken as indicating a relevant "submarket." [19]

Thus, this case squarely raises the basic market definition issues set forth above:

First, Brown Shoe's list of "practical indicia" is not and did not purport to be a self-contained blueprint for correct market definition analysis. A mere list of "indicia" does not tell a lay jury—typically unfamiliar with the legal and economic concepts involved—how those indicia are to be applied or put together. (Nor indeed does it adequately explain to a lower court how to define markets in cases tried without a jury.) On its face, a charge that simply tracks *Brown Shoe* is legally inadequate.

Second, Brown Shoe's "indicia" are of varying importance. The basic determinants of a product market are user substitutability and supplier substitutability. Products or services belong in the same market where either (1) buyers consider them to be close substitutes (reasonable interchangeability in use), or (2) suppliers can and do readily shift their productive resources from one product or service to the other in response to changing demands (reasonable interchangeability of productive

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[19] Because there was no way of knowing whether the jury resolved the disputed evidence on supply substitutability in the manner cited by the Court of Appeals or whether it arrived at its narrow market definition on legally erroneous grounds, the Court of Appeals should have remanded for proper instructions. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884).

resources). In either event, the various suppliers are in effective competition with each other, and hence are comparable alternatives to whom buyers may turn. All other "indicia" are simply evidentiary with respect to those basic determinants, and the proper weight to be given them varies widely. "Sensitivity to price changes" deserves heavy weight; such evidence strongly suggests either easy buyer or easy supplier substitutability. On the other hand, such factors as "distinct prices," "industry or public recognition . . . as a separate economic entity," or "specialized vendors," are much less significant, and useful only where more decisive indicators are equivocal. Consequently, it is a critical error—too easily inferred from *Brown Shoe*—to instruct a jury, as the trial court in this case did, that "the more of these criteria that a particular relevant market fulfills, the more likely it is a separate product/service market."

Third, *Brown Shoe*'s "market"/"submarket" distinction is confusing and potentially misleading—the very term "submarket" suggests something less than a market. Whenever lack of buyer and supplier substitutability clearly indicates that two products are in separate markets, there is no meaningful "broad market" encompassing both. On the other hand, whenever buyer and/or supplier substitutability point clearly to a market including two or more products, that is the relevant market and there is no "economically significant submarket" consisting of one product alone.[20] There seems little

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[20] Professor Posner makes precisely these points:

> "The 'submarket' approach is unsound. If the 'outer boundaries' of the market include only the product's good substitutes in both consumption and production—which seems a fair reading of *Brown Shoe*'s reformulation of the cellophane test—then a submarket would be a group of sellers from which sellers of good substitutes in consumption or production had been excluded, and these exclusions would deprive any market-share statistics of their economic significance."

R. POSNER, ANTITRUST LAW 129 (1976).

doubt that misapplication of the market/submarket distinction has made a significant contribution to the dubious market definitions that have littered the antitrust landscape over the past nineteen years.

B. The Issues Raised Are Important and Should Be Resolved by This Court.

The market definition issues raised by this case are of pervasive importance. Market shares are the basis for presumptive liability in virtually all merger cases. The reasonableness of those rules hinges on sensible market definition. If markets are ill-defined, market shares lose whatever significance they would otherwise have. An innocuous merger may be struck down; a potentially harmful merger may escape.

Similarly, proper market definition is critical in Sherman Act cases where proof of competitive injury is required either to protect possibly beneficial conduct [21] or simply to screen out cases of no competitive significance. For example, as discussed in Point II below, most courts have concluded that it is inappropriate to assimilate business torts into antitrust law, and accordingly that Sherman Act treble damages should not be awarded for business torts unless substantial injury to competition is shown. The latter cannot be determined without defining the market. Vague or loose market instructions, permitting the finding of unduly narrow markets, undercut the screening function that a substantial injury requirement is designed to perform.

As we stated at the outset, the approach to market definition reflected in the jury charge in this case is no aberration. The basic errors we have described are com-

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[21] *E.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

mon, and correcting them would be a long and much needed step toward clarifying a muddled area of antitrust law in both jury and non-jury cases. Particulars in the application of correct basic principles would remain to be resolved, but at least the lower courts would be put on the right course.[22]

II. THE FIFTH CIRCUIT HAS ADOPTED A UNIQUE TEST FOR DETERMINING WHEN ACTS OF UNFAIR COMPETITION VIOLATE THE ANTITRUST LAWS—A TEST THAT CONFLICTS WITH THE TESTS PREVAILING IN OTHER CIRCUITS AND THAT SHOULD BE REJECTED BEFORE MORE BUSINESS RIVALS ARE ENCOURAGED TO SEEK TREBLE DAMAGES FOR ORDINARY BUSINESS TORTS

In upholding the jury instructions on liability, the Fifth Circuit has adopted a test under which simple business torts may constitute antitrust violations whenever they hold some potential for injuring competition, whether or not actual injury to competition is shown. This new test is a significant departure from the more demanding standard of actual competitive injury being adopted by most of the circuits. Because the decision in this case will encourage more disgruntled business rivals to use the antitrust laws to get treble damages and attorney's fees for ordinary business torts, this Court should address the question promptly and resolve the conflict.

Despite this Court's time-honored admonition that the antitrust laws are not designed to remedy injuries from

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[22] Because the market definition issues raised by this case are of such importance to governmental as well as private enforcement of the antitrust laws, the Court, if it grants this petition, may wish to invite the Solicitor General to present the views of the United States.

all business torts,[23] a small but influential line of cases developed under which a conspiracy to eliminate a competitor by unfair means was treated as a *per se* violation of Section 1 of the Sherman Act.[24] Under this doctrine, frequently referred to as the *Pick-Barth per se* rule, the courts focus on the intent and conduct of the defendants and the injury to the plaintiff; there is no concern with the effect on competition.

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[23] *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945) ("[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 512 (1940) ("[T]he Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.' ")

[24] The doctrine originated in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932) (Plaintiff claimed that the defendant corporation conspired with plaintiff's employees to deprive plaintiff of its business by soliciting plaintiff's employees and misappropriating customer lists and cost records. The First Circuit affirmed the plaintiff's judgment, holding that "[t]o constitute an offense under [S]ection 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purposes and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent." 57 F.2d at 102.) Subsequently, the same court in *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960), characterized similar, albeit more extreme, methods of unfair competition as a *per se* violation of the Act. A *Pick-Barth* type of action was also recognized by the Tenth Circuit in *Perryton Wholesale, Inc.* v. *Pioneer Distrib. Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966). *See also Metal Lubricants Co.* v. *Engineered Lubricants Co.*, 411 F.2d 426, 431 (8th Cir. 1969); *Mr. Hanger, Inc.* v. *Rizzuto*, 410 F. Supp. 1158 (S.D.N.Y. 1975); *Tower Tire and Auto Center, Inc.* v. *Atlantic Richfield Co.*, 392 F. Supp. 1098 (S.D. Tex. 1975). Some courts extended the doctrine to find *per se* violations when the conspiracy was only to injure, but not to eliminate, a competitor. *C. Albert Sauter Co.* v. *Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973).

More recently, the courts have begun to recognize that the aims of the antitrust laws are different from and frequently antithetical to the aims of the laws against unfair competition. While the antitrust laws are concerned with adverse effects on competition, unfair competition laws are largely concerned with protecting the private interests of individual competitors. Acts of unfair competition do not necessarily affect market competition adversely; indeed, such acts are often pro-competitive. *Cf. Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964).[25] Because *per se* rules of illegality are appropriate only when "they relate to conduct that is manifestly anticompetitive," *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977), and because acts of unfair competition do not fit in that category, most of the circuits, including the Fifth Circuit, have been rejecting the *Pick-Barth per se* rule of illegality for acts of unfair competition.[26] Even the progenitor of the *Pick-Barth* line of cases, the First Circuit, has rejected the *per se* rule, at least insofar as

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[25] The conflict is particularly clear in the frequent cases involving employees who break off to form a new competing company. They may take customer lists and trade secrets with them, or in other respects attempt to profit from their former association. However distasteful such conduct may be from the perspective of tort law, antitrust purposes are served by the creation of a new or more effective competitor.

[26] *See Franklin Music Co.* v. *ABC, Inc.*, 616 F.2d 528, 541-42 (3d Cir. 1979), as amended Dec. 28, 1979, Jan. 8 and 9, 1980; *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir.), *cert. denied*, 49 U.S.L.W. 3409 (Dec. 1, 1980) (No. 80-517); *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549, 555-56 (7th Cir. 1980); *Stifel, Nicolaus & Co.* v. *Dain Kalman & Quail, Inc.*, 578 F.2d 1256 (8th Cir. 1978); *cf. Kaplan* v. *Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), 1980-1 Trade Cases ¶ 63,028 (9th Cir. 1979); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

it stands for the broad proposition that unfair competitive practices accompanied by an intent to hurt or eliminate a competitor constitute *per se* violations of the antitrust laws. An adverse effect on competition must be shown.[27] Similarly, the Tenth Circuit has qualified the support it appeared to give the *Pick-Barth* doctrine in 1965 in the *Perryton* case.[28]

Thus, the circuits that have considered the question are generally agreed that "bad acts" and evil intent by the defendant and resultant pecuniary injury to the plaintiff are not enough to sustain antitrust liability; the impact on competition must also be considered.[29]

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[27] *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 559-62 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

[28] *Craig* v. *Sun Oil Co.*, 515 F.2d 221, 223-24 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976) ("Reference is made in the *Perryton* opinion to existing competition, and it is not necessarily a per se case despite the citation of the First Circuit cases."). The Fourth and Sixth Circuits apparently have not faced the issue. The Second Circuit has also not addressed the issue, but several of the district courts in the circuit have and almost every such instance reveals at least a distaste for the *Pick-Barth* rule. *See Frederick Chusid & Co.* v. *Marshall Leeman & Co.*, 326 F. Supp. 1043 (S.D.N.Y. 1971); *Vogue Instrument Corp.* v. *Lem Instruments Corp.*, 40 F.R.D. 497 (S.D.N.Y. 1966); *cf. Mr. Hanger, Inc.* v. *Rizzuto*, 410 F. Supp. 1158 (S.D.N.Y. 1975).

[29] The literature is in total accord; the *Pick-Barth* rule has been severely criticized. *See* Yoerg, *Should A Trade Secrets Misappropriation Claim Lie in the Procrustean Antitrust Bed?*, 22 ANTITRUST BULL. 1 (1977); Hutter, *"Dirty Tricks"* and *Section One of the Sherman Act: Federalizing State Unfair Competition Law*, 18 B.C. INDUS. AND COM. L. REV. 239 (1977); Boone, *Single-Corporation Competitive Torts and the Sherman Act*, 2 GA. L. REV. 372 (1968); Note, 42 FORD. L. REV. 909 (1974); Note, *Unfair Competition Under the Sherman Act*, 59 IOWA L. REV. 1194 (1974); P. AREEDA & D. TURNER, III ANTITRUST LAW § 828b (1978). One author has even advocated that some business torts be considered *per se* legal insofar as antitrust law is concerned. Note, "Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act," 58 TEXAS L. REV. 415 (1980).

The conflict arises because the courts do not agree on what that impact should be. Most of the circuits require an actual adverse impact on competition, usually a "substantially adverse" impact.[30] The Fifth Circuit, however, now imposes treble damage liability for unfair acts that simply have a potential for anticompetitive effects.

The leniency of the Fifth Circuit's standard can be seen in both the jury charge it explicitly approved and the new test it announced. The charge to the jury in this case defined unreasonable restraints of trade as conduct which "tends" to restrict competition. The trial court added that "you need not find a specific injury, but you must find that the conduct tends or is reasonably calculated to prejudice the public interest."[31] More-

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[30] *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee, supra,* 624 F.2d at 811 ("The Sherman Act requires more than mere injury to a competitor. Plaintiffs must show also that the 'effect upon competition in the marketplace is substantially adverse.' "); *Franklin Music Co.* v. *ABC, Inc., supra,* 616 F.2d at 541 (Plaintiff must show "a substantial impact on or restraint of trade affecting competition in a product market."); *Kaplan* v. *Burroughs Corp., supra,* 611 F.2d at 291 ("[T]he primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects."); *Craig* v. *Sun Oil Co., supra,* 515 F.2d at 224 ("[The defendants' conduct] had no impact on the competitive situation, and was not actionable under the antitrust theory of plaintiff's case."); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc., supra,* 508 F.2d at 562 ("While the relevant market for purposes of section 2 is not necessarily that for purposes of section 1, there still must be some consideration of the effect of a defendant's conduct on some significant part of the market. There is no evidence [in the present case] whatever of harm to general competition in the market.").

[31] The entire instruction may be found at 624 F.2d at 1353, n.20; App. A at 20a.

over, despite Petitioners' requests that it do so, the Court did not instruct the jury to find whether the various alleged instances of improper conduct adversely affected competition. Rather, the jury was simply told that each of the alleged bad acts, if it occurred, would be evidence supporting Respondent's Sherman Act claims. In short, the jury charge required at most only a finding that Petitioners' conduct *tended* to injure competition, and taken as a whole may not have required even that.[32]

On appeal, the Court below responded as follows to Petitioners' objections to the jury charge:

> "Defendants complain about the court's charge to the jury, contending that it failed adequately to instruct them on the necessity of finding injury to competition. We believe the charge, some of which is set out in the margin, when viewed in its entirety was adequate to withstand a challenge under *Northwest Power* [*Products, Inc.* v. *Omark Industries, Inc.*]." 624 F.2d at 1353; App. A at 20a.

Earlier in its opinion, the Court had read *Northwest Power* as setting forth a two-part test under which a jury can find a defendant liable under Sherman Act § 1 for acts of unfair competition if plaintiff shows "(1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." *Id.* at 1351; App. A at 16a. Thus, the Fifth Circuit will find liability if it finds that the defendant could not lawfully have acquired the plaintiff and that defendant's conduct "threatens" Sherman Act values, whether or not the "threat" results in an actual diminution of competition.

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[32] Under the broad "public interest" standard of the judge's charge, plaintiff's counsel was permitted to argue that "[i]t is in the public interest to have a marketplace that is not loaded down with bribery" and was able continuously to refer to Petitioners as "The Corrupters." CA App. at 1900-1903.

This test falls far short of the requirement of actual (and usually substantial) injury that other circuits have adopted. The first part incorporates the standards of antimerger law. The legality of a merger turns on an "incipiency" test; proof of actual anticompetitive effects is not required.[33] And some of the judicially formulated rules under the law of mergers permit findings of illegality not on the basis that the particular merger in question would be likely to have any significant ill effects, but rather on the basis that an accumulation of mergers of that magnitude would lead to a substantial lessening of competition.[34] Similarly, the "tends to" language of the jury charge and the "threatens" language of the second part of the test contemplate only incipient not actual harm to competition.[35]

A probability of adverse competitive consequences may be a sufficient basis for an antitrust court to enjoin a defendant from engaging in some kinds of business torts in some kinds of circumstances. But it is a totally inappropriate test for awarding an aggrieved competitor

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[33] *Brown Shoe Co., Inc.* v. *United States, supra,* 370 U.S. at 318, n.32 and 323 (". . . § 7 of the Clayton Act was intended to reach *incipient* monopolies and trade restraints . . ." and "Congress used the words '*may be* substantially to lessen competition', to indicate that its concern was with *probabilities,* not certainties." (Footnotes omitted and emphasis added.)).

[34] *See, e.g., United States* v. *Von's Grocery Co.,* 384 U.S. 270, 278 (1966); *Brown Shoe Co., Inc.* v. *United States, supra,* 370 U.S. at 343-44.

[35] Actually it is difficult to imagine circumstances in which business torts directed against a competitor would add to the market effect of acquiring that competitor. Even if the torts eliminate the victim, the competitive effect is no worse than merger and may well be less, because the perpetrator does not acquire the good-will or going concern values that merger would have yielded.

A merger test may be a useful *threshold* test in a variety of business torts cases, leading to the dismissal of cases in which

triple the amount of damages suffered from lost business. Aggrieved competitors should get damages only for injuries causally related to acts that *actually* injure competition, not from acts that *might* injure competition.[36]

There is no need to belabor the obvious fact that the difference between the "tendency" test of the Fifth Circuit and the actual impact test of the other circuits is more than a semantic quibble. Many decisions of this Court comparing Sherman Act and Clayton Act tests have stressed the difference.[37] It is perhaps noteworthy, however, that plaintiff in the present case appears to be the only party ever to prevail in an antitrust damage action for acts of unfair competition where the test was not *per se* illegality.[38]

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merger would have been lawful. But to find *liability* for business torts because a merger would be unlawful on "incipiency" grounds is quite another matter.

[36] This Court has recently made the point, emphasizing the difference between the prophylactic nature of the anti-merger laws and the remedial nature of the treble-damage provisions. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

[37] *See, e.g., Brown Shoe Co.* v. *United States, supra*, 370 U.S. at 317-18, n.32; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 312-13 (1949).

[38] The conflict is not mooted by the fact that the Court below, having approved the jury charge under its potentiality test, cited evidence which in its view permitted an inference of actual competitive injury. Since the jury was given a "tendency" charge, the Court of Appeals could have accepted the verdict despite the instruction only if the evidence of actual injury to competition were so clear that a reasonable jury could not find otherwise. That was not the case and the Court did not so hold. On the contrary, there was no adverse change in market structure after the alleged bad acts and there was overwhelming evidence in the record, including testimony of Associated's own officers, that the alleged market remained intensely competitive. CA App. at 104-105. Moreover, the Court's reliance on a comparison of prices and profits on transactions before and after the challenged conduct was erroneous

The Fifth Circuit has been an influential force in the movement toward rejecting the *Pick-Barth* rule. Its articulation of a new test to replace the *per se* rule is likely to be influential as well. This Court should correct the inappropriate use of incipiency tests in unfair competition actions before more time and money is wasted litigating garden-variety business torts in federal courts under the antitrust laws.

III. THE COURT, IF IT GRANTS THIS PETITION, SHOULD ALSO CORRECT THE PLAIN ERROR COMMITTED BY THE COURT BELOW IN UPHOLDING THE VERDICT OF LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT

The Court below held that no one of the alleged instances of improper conduct, standing alone, could support liability under Section 2 of the Sherman Act. Only "taken together" could these acts support the jury's verdict.[39] The Court, however, overlooked the fact that the jury was not so instructed. The jury was simply told that each of the alleged instances was "evidence supporting plaintiffs' antitrust claims." 624 F.2d at 1359, n. 27; App. A at 31a. Thus, the jury could have easily predicated liability on a finding that only one or two instances of improper conduct occurred. Since the jury was not asked to indicate its findings with respect to the

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for reasons that need not be spelled out here but were elaborated upon in the petition for rehearing below.

[39] "Probably no one of the instances of improper conduct, standing alone, would lead to section 2 liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict." 624 F.2d at 1356; App. A at 25a.

Later in the opinion the Court was more categorical, holding: "We reiterate that *all* of this conduct, taken together, rose to the level of a section 2 violation and that isolated acts, standing alone, did not." *Id.* at 1363; App. A at 41a (emphasis in original).

individual acts but was asked only conclusory questions as to ultimate liability, one cannot tell on what basis the jury found liability.[40] Accordingly, a remand was plainly required.[41] *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884).

Where, as here, the evidence necessary to convert garden-variety business torts into an antitrust violation is so thin and a jury disposition to condemn so likely, courts must be particularly attentive to the distinction between sufficiency of the evidence and adequacy of instruction. Assuming that the Court of Appeals was correct in finding that the evidence, if construed in a particular way, was sufficient to support liability under Section 2, the Court could affirm only if it also found that the jury was so instructed. This condition was not met.[42]

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[40] Petitioners had tried to avoid this problem by proposing specific interrogatories addressed to the occurrence *vel non* of each alleged bad act. CA App. at 2472-2497.

[41] The evidence on each of the alleged "bad acts" was highly controverted; one cannot say as a matter of law that the jury must have found enough "bad acts" to satisfy the test of the Court of Appeals.

[42] The Court of Appeals made the same error in upholding the jury's market definition, *see supra* at 15-16. It also made a similar error in affirming liability under Section 1 on the ground, *inter alia*, that acquisition by Page of Associated's San Antonio operation would have violated Clayton Act § 7. That issue was never even raised at trial, let alone put to the jury, and Petitioners were therefore deprived of the opportunity to present evidence on various issues relevant to a Section 7 "potential competition" case, the theory on which the Court of Appeals relied. *See* 624 F.2d at 1351-52; App. A at 16a-18a.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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No. 80-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

PAGE AIRWAYS, INC., *et al.*,
Petitioners,
v.
ASSOCIATED RADIO SERVICE CO.,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-1159

ASSOCIATED RADIO SERVICE COMPANY,
Plaintiff-Appellee,

ASSOCIATED RADIO COMPANY,
Plaintiff-Appellant,

v.

PAGE AIRWAYS, INC., *et al.*,
Defendants-Appellants, Appellees.

Aug. 29, 1980

Appeals from the United States District Court
for the Northern District of Texas

Before GEE, FAY and VANCE, Circuit Judges.

GEE, Circuit Judge:

This case involves an acrimonious disagreement between formerly harmonious associates in the aircraft outfitting business. Instead of more familiar antitrust allegations, such as price fixing or tying arrangements, plaintiffs in this case allege essentially that unfair business practices committed by defendants had such a negative impact on competition as to constitute illegal restraints of trade under section 1 of the Sherman Act[1] and conspiracy or attempts to monopolize under section 2 of the Sherman Act.[2] We shall first set out in some detail the nature of the aircraft outfitting business and

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[1] 15 U.S.C. § 1.

[2] 15 U.S.C. § 2.

the facts relevant to the alleged antitrust violations. We will then discuss why we feel that the jury verdicts and judgments in this case must be upheld, except those against defendant Edwin Hamilton.

The Aircraft Outfitting Business

After World War II, outfitting companies sprang up to convert surplus government aircraft to private use. These companies installed or modified avionics in the surplus aircraft and constructed new interiors. When aircraft manufacturers began post-war production of planes for private use, the outfitting companies also began to install original avionics and interiors [3] in "green" [4] aircraft delivered new from the factory. Today some twenty major outfitters throughout this country and a few in Europe outfit a variety of private aircraft. Outfitting work includes a mix of original installation in green aircraft and reoutfitting or refurbishing other aircraft for private or business use.

The plaintiffs in this case are Associated Radio Service Company ("Associated") and Associated Radio Company ("Radio"). The defendants are Page Airways, Inc. and its wholly owned subsidiary, Page Gulfstream, Inc. (col-

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[3] The installation of avionics in turbine-powered aircraft involves the placing of the actual electronic equipment, including inertial navigation systems, if needed, in the aircraft and the wiring of such equipment together, to the controls, and to the power source. An avionics system usually includes flight control, navigation, and communication subsystems. The installation of interiors includes the design and installation of the seats, carpeting, and other interior items in the aircraft cabin.

[4] Green aircraft are those new planes that are sold to customers without completed avionics and interior furnishings and that are therefore outfitted by independent companies. Some models that are delivered green include Grumman Gulfstream I and II, Jet-Star I and II, Hawker-Siddley jets, Merlin, DC-9, 707, 727, some models of the Falcon, and various heavy-duty helicopters.

lectively referred to as "Page"); Douglas Juston, an officer of Page; Ross C. Chapin, former president and director of both Associated and Radio and, at the time of trial, president of Page; and Edwin C. Hamilton, former assistant to Chapin and, at the time of trial, an officer of Page. Associated has been in the aircraft outfitting business under various names and with assorted business associates since 1948. For a time in the mid-1960's, Associated installed avionics in a variety of aircraft, for which Executive Aircraft provided the hangar space and interior installations. This arrangement terminated in 1968, and Associated at that time decided to open its own complete outfitting facility in Dallas. It continues to operate that facility today.

In 1953, Radio was formed to purchase equipment from manufacturers, to own the inventories, and to sell avionics equipment, primarily to Associated. Radio and Associated had common owners, officers, and directors, but Radio had no employees other than its executive officers. Its nonmanagement activities were performed by Associated's employees. After purchasing avionics equipment from manufacturers, Radio added between 10 and 25 percent to its costs in selling the equipment to Associated. In addition, Radio made some other sales of avionics equipment and supplies to third parties.

In 1967 or 1968, Page became a dealer for green Grumman Gulfstream II's (G-II's).[5] The G-II is the largest and has the longest range of any business aircraft on the market. Its avionics is the most sophisticated, complex, and expensive in the industry. Capable of transoceanic

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[5] In the early 1970's, Page became exclusive worldwide dealer for the G-II, although customers continued to be able to purchase the G-II directly from Grumman, also.

flights, it requires inertial navigation systems (INS) in its avionics package. The Grumman Gulfstream II is always sold green. In the factory, a rudimentary flight package is installed to allow the plane to be ferried to the outfitting facility; after the plane has reached the facility, the flight package is removed, and the plane will no longer fly until it is outfitted with avionics. Grumman began production of this model in 1967, at a rate of about 20 per year. It had produced approximately 130 by mid-1973 and could be expected to produce no more than 270 G-II's before that model became obsolete.

Page and Associated entered into an agreement in 1968 whereby Page would sell the green G-II's and Associated would design and install, in San Antonio, avionics in those planes for Page's customers. A third party was involved for a time in the installation of interiors in the San Antonio G-II facility, but the interior installation operation soon came to be financed and managed by Page and employees of Associated. The name of the interior facility was Associated Page Interiors, Inc. Associated moved its key G-II avionics installation employees to San Antonio and put in a G-II avionics facility that cost about $200,000, plus hangar costs and inventory. Under the contract, Page received as a sales commission ten percent of Associated's billings, except for 18 pending G-II avionics sales that Associated had been working on before its association with Page.

In the years between 1968 and 1973, the contractual arrangement between Page and Associated worked well for Associated. Associated climbed to a prominent position among all avionics outfitters of G-II's; by late 1972, it was installing avionics in just over 50 percent of all G-II's coming off the assembly line. Meanwhile, the number of companies able to compete effectively for G-II

outfitting contracts dwindled from eight or nine in 1968 to about five in 1977.[6]

Before a company entering the avionics outfitting business can become profitable, it must overcome certain barriers. For example, its employees must ascend a learning curve during which they gain experience and efficiency in working on a certain type of aircraft. In the case of the G-II, this learning curve was estimated variously at one and one-half to two years.[7] In addition, a company must acquire or create engineering diagrams and gain FAA approval, in the form of Supplemental Type Certificates (STC's), for its avionics package in a particular plane. There was evidence showing that it took Associated about two and one-half years after entry to attain a profitable position. Its average profit on its last nine sales before September 1973 was about $52,000 per plane.[8]

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[6] The following table is taken from defendants' exhibits 311 and 312 and plaintiffs' exhibit 243:

No. Planes per Year Outfitted with Avionics

Installers	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977 *
Marshall's of Cambridge	0	1	1	0	0	0	0	0	0	0
AiResearch	13	13	11	2	1	7	0	1	2	0
Atlantic Aviation	16	8	1	1	2	3	0	3	1	3
Qualitron	1	1	0	0	1	0	0	0	0	0
Executive	2	3	0	0	2	3	4	2	2	0
Pacific Airmotive	1	1	0	0	0	0	0	0	0	0
Little Rock Automotive	0	2	1	0	0	0	0	0	0	0
Western Commander/Jet Center	0	1	2	0	0	1	1	3	2	1
Associated	5	7	5	4	8	2	1	2	2	0
Page	—	—	—	—	—	2	8	10	11	7
Totals	38	37	21	7	14	18	16**	21	20	11

* Represents only the first half of the year.
** Two G-II's were outfitted in 1974 by Grumman for NASA's space shuttle program.

[7] Avionics installation in a G-II requires approximately 6 months.

[8] The G-II's green price was over $3,000,000. Interior and avionics outfitting cost another $800,000 to $1,000,000, with avionics package alone averaging, in 1973, about $595,000.

Defendant's Conduct

Plaintiffs allege that as early as 1971 Page made the decision to enter the avionics outfitting business itself. Plaintiffs further allege that Page entered into an unlawful conspiracy to eliminate plaintiffs as a competitor in the G-II avionics field by, among other things, bribing away plaintiffs' employees; causing the theft of plaintiffs' trade secrets, proprietary information, records, and documents; causing plaintiffs' employees to withhold information from plaintiffs and to work secretly for defendants; interfering with plaintiffs' mechanic's lien; and filing spurious lawsuits. The facts show that defendants did indeed hire away Ross Chapin, who was president and director of Associated and vice president and director of Radio, and Edwin Hamilton, Chapin's former assistant. These two men are now officers of Page. Page also copied or caused to be copied engineering diagrams of the avionics packages in several G-II's that had been outfitted by Associated. Some of these copies may have been made before the contractual arrangement came to an end.

In June 1972, Page notified Associated that Page wished to terminate the agreement effective June 20, 1973. It seems that everyone agrees that Page had every right to terminate at that time if it so wished. However, Chapin seems to have allowed contracts for the sale of avionics packages to be made in Page's name while serving as president of Associated and with the knowledge that the airplanes would not be delivered until after the termination of the joint venture. Plaintiffs contend that by copying Associated's engineering drawings and other data, defendants were able to acquire avionics estimated to cost about $250,000 to $350,000 to produce, thus eliminating the two years of effort required for the accumulation of a sufficient number of STC's to be competitive and eliminating the startup losses estimated to cover two and

one-half years. By acquiring the avionics drawings and by hiring Associated's employees at the termination of the venture, the defendants were able to avoid the learning curve and to begin work immediately on the avionics packages that Chapin had sold in Page's name.

Associated also contends that an altercation over a debt owed it by Page led to Page filing several spurious lawsuits. In August 1973, Lee Juan Lanford, an officer of Associated, went to San Antonio and discovered that Associated would require several more days' work to complete its avionics installation in a plane belonging to the Republic of Gabon. Lanford advised Page that Associated would not relinquish possession of the plane after the completed installation without being paid the $660,000 sales price, and he parked his camper in front of the hangar door to prevent Page from removing the plane until the price was paid. Associated maintains that they were merely enforcing their mechanic's lien under Texas law. Page then filed a lawsuit based upon an allegedly false affidavit and obtained possession of the plane before the completion of the installation. They then amended their petition and filed an interpleader based upon, again, allegedly false statements and affidavits. Evidently Page also filed other lawsuits in both state and federal court. Through all this, defendants were partially successful in delaying payment of the money due plaintiffs, thus rendering plaintiffs' financial position precarious.

Plaintiffs' allegations of "dirty tricks" committed by Page included bribes or otherwise suspicious payments to various parties. For example, there was evidence that Joseph Anckner, Grumman's director of international sales, took his wife to Hawaii in 1974 for a vacation on money "loaned" to him by Page, although the loan had not been repaid at the time of Anckner's deposition in March 1977; nor had Anckner reported this loan to his

employer.[9] In 1975, after Associated had negotiated a contract for avionics installation[10] in a G-II belonging to Kirby-American, Juston complained to Grumman, Anckner visited the customer, and Associated lost the contract to another installer, although not to Page. There was also documentary evidence and testimony showing that Chapin, after he began working for Page, was able to get an avionics customer to award its avionics work to Page at $10,000 over the *highest* bidder. Thus, Page was able to obtain the outfitting contract at a price of $834,000 at a time when the low bid, $759,000, had been submitted by Associated. There were three other bidders.

Defendants, after entering the avionics installation business, were singularly effective at obtaining contracts for the outfitting of airplanes belonging to foreign governments. In fact, no outfitter except Page sold and installed avionics in a green G-II for a foreign government customer between mid-1973 and mid-1977, the cutoff date for discovery. There were approximately fourteen of such sales during those years. There was evidence from which the jury could infer that payments had been made to officials of some foreign governments in return for their awarding the contracts to Page.

The Outcome Below

After the termination of the agreement between Page and Associated, Associated brought suit in federal district court in Texas in October 1973. Plaintiff pled vio-

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[9] At his deposition, Anckner stated that the loan was in the approximate amount of $1,000, that there was no particular due date, and no interest was discussed.

[10] After the Associated-Page split, Associated began preparing a G-II outfitting facility at its Dallas base of operations and continued to bid on G-II avionics outfitting. However, it was unable to secure its first contract until late 1974 and only outfitted five green G-II's between mid-1973 and mid-1977. In all, Associated received eight contracts after the arrangement with Page terminated.

lations of sections 1 and 2 of the Sherman Act, relying primarily on the *per se* rule found in the line of cases beginning with *Albert Pick-Barth Co.* v. *Mitchell Woodbury*, 57 F.2d 96 (1st Cir. 1932). The district judge rejected the application of the *per se* rule on the state of the record as of June 1976 and dismissed the complaint with leave to amend. *See Associated Radio Service Co.* v. *Page Airways, Inc.*, 414 F.Supp. 1088 (N.D. Tex. 1976). Plaintiffs' amended complaint survived defendants' motion to dismiss, and the suit proceeded to trial, which consumed twelve weeks of the summer of 1977. A jury returned a verdict favorable to plaintiffs on all issues. Among other things, the jury found that the relevant market was the sale and installation of avionics systems in Grumman Gulfstream II aircraft throughout the world, that the corporate and individual defendants conspired, combined, or agreed to restrain trade unreasonably in violation of section 1 of the Sherman Act, that the same defendants monopolized, attempted, or conspired to monopolize the sale and installation of avionics equipment and systems in Gulfstream II aircraft in violation of section 2 of the Sherman Act, and that Associated and Radio sustained injury to their business or property that was proximately caused by the antitrust violations. The jury assessed Associated's damages at $2,750,000 and Radio's damages at $550,000. The court trebled the damage award to Associated and added attorneys' fees, with the total award to Associated being $9,048,210. The court also entered judgment n.o.v. for defendants on the claims of Radio, based on the court's conclusion that Radio did not have standing to sue.

Relevant Product Market

Since one of the necessary elements of a section 2 violation is the possession of or conspiracy or attempt to acquire monopoly power in a particular market, the jury's finding on the extent of the market must be upheld if

we are to sustain the jury's verdict finding violations of that section of the Sherman Act. *See Yoder Brothers* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1366 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977). *See also United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). This court has also held, in a case involving section 1 of the Sherman Act and allegations of unfair competition, that the market power of defendant is crucial. *See Northwest Power Products, Inc.* v. *Omark Industries*, 576 F.2d 83 (5th Cir. 1978). Moreover, the trial court recognized in its charge to the jury that plaintiffs could not succeed under either section 1 or section 2 without a favorable jury finding on their market definition.

Relevant market is a question of fact, and findings concerning the market should be overturned on appeal only if clearly erroneous or where there is no evidence to support the finding below. *Heatransfer Corp.* v. *Volkswagenwerk, A.G.* 553 F.2d 964, 979 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). Defendants contended vigorously throughout the trial, and now on appeal, that the relevant market was the sale and installation of avionics *and interiors* in *all* turbine-powered private aircraft. However, since defendants' contentions were before the jury, as was most of defendants' evidence, they essentially ask us to substitute our findings of fact for those of the jury. We think there was ample evidence of high entry barriers and of the difficulty outfitters encountered in switching back and forth from one model of aircraft to the next to allow the jury to find a relatively narrow market.[11] The court's

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[11] Defendants' evidence tended to show that an outfitter could get into the avionics business in as little as three months with an expenditure of only $30,000 - 50,000 and that numerous outfitters switched from one aircraft model to another with relative ease. On the other hand, Associated's evidence tended to show that it was very expensive and time consuming (plaintiffs' estimates

charge on this issue was clear and spelled out the relevant factors for the jury to consider,[12] and we therefore

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ranged up to $3,000,000 and two and one-half years) to enter the G-II avionics installation market and that independent avionics installers do not install avionics in a variety of new aircraft at the same time. Further, there was no evidence that any new company besides Page had begun installing avionics in G-II's after 1969.

[12] Now, before you consider the law relative to these violations, of Section 1, as well as defendants' alleged violations of Section 2 of the Sherman Act, it will be necessary for you to determine the relevant market in this case. Both plaintiffs' allegations concerning defendants' intention to eliminate each of them from competing as well as plaintiffs' allegations of violations of Section 2 of the Sherman Act, are concerned with the amount of competition that has been foreclosed, so it will be necessary to define the market in which competition exists before you can determine if the competition within this market has been harmed at all or harmed not insignificantly. Similarly, with regard to market, you must determine its existence before you can consider the issue of defendants' intent, if any, to eliminate plaintiffs from such market, if any.

The relevant market consists of two dimensions: The geographic market and the product/service market. Thus, in determining a relevant market you will be concerned with the questions of what product-service market is involved and who competed for sales in this relevant product/service market.... You will not have to find the relevant geographic market, ... as this fact has been stipulated by the parties. You must however determine from a preponderance of the evidence the relevant product/service market, hereinafter called the "relevant market." The parties are in sharp dispute over what constitutes the relevant market. This dispute must be resolved by you in accordance with the instructions I am about to give you. First, however, I want to summarize what the parties contend regarding the relevant market.

Plaintiffs contend that the relevant market within which to judge the conduct about which they complain is the sale and installation of avionics in Grumman Gulfstream II aircraft. The defendants maintain that the relevant market is broader than the sale and installation of avionics in Grumman Gulfstream II only. The defendants submit that no such relevant market exists. The defendants contend that the relevant market includes the installation of both avionics and custom in-

hold that the jury's factual finding regarding Associated's claim is supported by the evidence.[13]

Violations of Section 1

Defendants essentially make two arguments here. One is that plaintiffs only proved that defendants' conduct caused injury to *plaintiffs*, not to *competition*, and thus

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teriors so far as any particular aircraft is concerned and further, that the relevant market as such, includes the sale and installation of avionic equipment and systems, together with custom interior, in a variety of business aircraft.

In determining the relevant market you must consider the following factors: (1) The lack of reasonable interchangeability of use between the product and/or service itself and substitutes for it; (2) industry or public recognition of the relevant market as a separate economic entity; (3) the product's and/or service's peculiar characteristics and uses; (4) uniqueness of the production facilities required to manufacture or provide the product and/or services; (5) distinct customers of the product and/or services; (6) distinct prices for the product and/or services; (7) sensitivity to price changes and; (8) specialized vendors of the product and/or service.

No one factor is necessarily decisive, but the more of these criteria that the particular relevant market fulfills, the more likely it is a separate product/service market.

For the purpose of this case, it is immaterial whether you find from a preponderance of the evidence that the relevant market is a market or a submarket. The relevant market may be either a market or a submarket. The definition of the relevant market is crucial. If the relevant market is the broader definition defendants advance, it would not be possible for you to find that the defendants or any of them have violated the Sherman Act, as to which I will say, ladies and gentlemen, you may proceed to answer all of the issues based on the preponderance of the evidence and not just Issue Number 1 as to relevant market.

[13] We hold in a later section of this opinion that Radio failed to prove that a market existed that was confined only to the sale of G-II avionics equipment to installers, and we also hold that Radio lacked standing to sue. Those holdings, however, do not affect the validity of the jury's market finding regarding Associated's claims.

fell short of the proof necessary under section 1 and our case law. The second argument is that even if Associated attempted to prove injury to competition, it failed.

At the time this case was tried, it was not clear whether this circuit would adopt the *per se* rule found in the *Pick-Barth* line of cases. The trial judge recognized this uncertainty in our case law and dismissed plaintiffs' complaint in an order that reads, in pertinent part:

> Plaintiffs have failed to plead a claim under Section One, although Plaintiff may replead within fifteen days of this order and must ultimately prove either that the particular conduct alleged in this case unreasonably restrains competition or, if Plaintiff wishes this Court to apply a per se analysis, that the alleged conduct is in general so anticompetitive that this Court would be correct in drawing an inference from it that anticompetitive effects will occur in most circumstances when such behavior recurs.

414 F.Supp. at 1090.

It can be seen that the district court at least left the door ajar on the *per se* doctrine, and plaintiffs may have proceeded on to trial under the assumption that they could prove enough to come in under a limited *per se* analysis. However, plaintiffs also attempted to prove that competition in the G-II market had been injured.

Since the district court entered judgment in this case, our court has spoken on the application of the antitrust laws to allegations of unfair competition. *See Redwing Carriers, Inc.* v. *McKenzie Tank Lines, Inc.*, 594 F.2d 114 (5th Cir. 1979) (affirming 443 F.Supp. 639 (N.D.Fla.1977)); *Northwest Power Products, Inc.* v. *Omark Industries, supra.* These cases make clear that the *Pick-Barth per se* doctrine is not to apply and that a plaintiff who alleges unfair competition or other business torts must prove injury to competition.

Defendants advance the proposition that plaintiffs merely proved injury to themselves and claim that the jury verdict must be reversed as a matter of law. While we are extremely reluctant to allow an antitrust claim for treble damages to rest solely on allegations of business torts, we find, contrary to defendants' contention, that Associated's proof in this case was sufficient to withstand the test articulated, after this case was tried, in *Northwest Power*.

In *Northwest Power*, Omark Industries terminated Northwest Power as a distributor of Omark's power-actuated tools, substituting for it Bosco Fastening Service Center. Several of Northwest Power's employees defected to Bosco, and agents of Omark and Bosco made false and disparaging remarks to Northwest's customers in an attempt to eliminate Northwest from the market. 576 F.2d at 85-86. Before its termination, Northwest had been the number two firm in the market, with a 20 percent market share; Bosco held an 11.5 percent share after replacing Northwest, whose share plunged to 2 percent. *Id.* at 86. This court held that the foregoing facts tended to show that "defendants' conduct *enhanced* rivalry rather than reducing it." *Id.* at 91 (emphasis original). In addition, Northwest failed to prove that either Omark or Bosco earned an excessive profit on its business. *Id.*

We pointed out in *Northwest Power* that "a supplier may switch dealers and conspire with a new dealer to take the place of an established one" without violating the antitrust laws. *Id.* at 86. In fact, Omark probably could have eliminated all distributors of its products by vertical integration, *i.e.*, by beginning distribution of its own products) without running afoul of the antitrust laws. *See* 3 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 725-727, 828c (1978).

We now quote extensively from *Northwest Power* in order to spell out the pertinent law in our circuit on unfair competition as an antitrust violation:

The more modern courts examining the *Pick-Barth* rule have stated that it applies only when the defendant is a "significant existing competitor." *Southland Reship, Inc.* [*v. Flegal*, D.C.], 401 F.Supp. [339] at 346-347; *see George R. Whitten, Jr., Inc.* [*v. Paddock Pool Builders, Inc.*, 1st Cir.], 508 F.2d [547] at 562; *Tower Tire & Auto Center, Inc.* [*v. Atlantic Richfield Co.*, D.C.], 392 F.Supp. [1098] at 1108-1109. *But see Atlantic Heel Co.* [*v. Allied Heel Co.*, 1st Cir.], 284 F.2d [879] at 881; *Metal Lubricants Co.* v. *Engineered Lubricants Co.*, 411 F.2d 426, 430 (8th Cir. 1969). While this requirement begins to limit *Pick-Barth* to Sherman Act proportions, it fails to do the job entirely.

The Sherman Act was conceived as a weapon against monopolies, trusts, and conspiracies which used agreement instead of financial consolidation to achieve the same results. The market power of the defendant charged with a *Pick-Barth* violation is crucial, for two reasons.

First, absent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise. *See, e. g., United States* v. *General Dynamics Corp.*, 415 U.S. 486, 494-498, 94 S.Ct. 1186 [1192-1194], 39 L.Ed.2d 530 (1974). *See generally*, L. Sullivan, Antitrust § 204 (1977). If a defendant could achieve a desired result either by lawful merger or by engaging in unfair competition, the choice of the unfair competition route alone should not give rise to an antitrust violation.

Second, only if the defendant can gain an increment of monopoly through his unfair competition would the additional sanctions of the Sherman Act, including treble damages and criminal sanctions, be appropriately used to deter him. Single damages or

equivalent injunctive relief is thought sufficient to compensate a firm for unfair competition. *Cf.* R. Posner, Economic Analysis of Law 28-29 (1973) (decrying remedies other than actual damages for breach of a restrictive covenant).

The "significant existing competitor" requirement misses the mark in several respects. By not aiming at market power, it omits a number of relevant considerations, including the defendant's market share before and after the unfair conduct, the number and relative size of firms in the market, the conditions of entry, the potential competition from firms outside the market, and whether a trend toward concentration exists. It also excludes cases in which a new entrant possesses such dramatic market power that his conduct, aimed at eliminating competition, threatens the values protected by the Sherman Act. *Cf. United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973) (certain market extension mergers illegal).

576 F.2d at 89. It thus can be seen that *Northwest Power* establishes for unfair competition cases under section 1 of the Sherman Act a two-part test: (1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values. We shall now examine the facts of the case under consideration in light of this test.

We believe that the first prong of *Northwest Power* is met here. That is, Page's conduct in this case was prohibited by the law of mergers; therefore, the interests protected by the antitrust laws do come into play. Regarding merger law, we find guidance in *FTC* v. *Proctor & Gamble Co.*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967) (often called the *Clorox* case), which holds that where a *market is concentrated* and where a *powerful potential entrant* attempts to buy out or merge with

the *most significant competitor* in the market, the merger would have such a potential for lessening competition that it could be prevented by the Federal Trade Commission. In this case Page essentially took over, by horizontal entry, the most significant existing competitor in the market, in contrast to the vertical supplier-distributor relationship in *Northwest Power*. Given the jury definition of the relevant market, the evidence is overwhelming that the market was concentrated. From nine competitors for G-II avionics outfitting in 1968-69, the market dwindled in the early 1970's to five in 1977.[14] When the Associated-Page agreement ended in mid-1973, Associated had approximately 50 percent of the market, and four firms were fighting over the other half. Upon Page's entry, its market share went dramatically from zero to 50 percent in one year and had risen to 64 percent[15] at trial.

Additionally, there was conclusive evidence[16] that Page was a potential entrant into the G-II avionics market. Page was exclusive worldwide dealer for the green G-II, it was already in the interior outfitting business through its venture with Associated, and it had the customer contracts, the capital, and the liquidity to be a viable new

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[14] *See* n. 6, *supra*. Since most witnesses agreed that a firm must receive two or three G-II contracts per year to remain in the market, the G-II production rate (about 20 per year), without more, would itself tend naturally to limit the market to about seven firms.

[15] *See* n. 16, *infra*.

[16] In addition to a great deal of testimony on Page's intent to enter the market, Associated introduced an exhibit (plaintiffs' exhibit 42) consisting of handwritten notes taken by Juston of a meeting in late 1972. The notes clearly show Page's contemplated entry, by means of a buyout or otherwise. The notes also show Page's awareness of the two years required independently to develop engineering and STC's necessary to compete in avionics installations.

entrant.[17] Since these facts are within the *Proctor & Gamble* ambit, we find that if Page had attempted to acquire Associated directly, the acquisition would have violated the antitrust laws. Thus, we hold that Associated has cleared the first hurdle in *Northwest Power*.

With regard to the second prong of *Northwest Power*, we note significant differences between it and the case under consideration, differences weighing in Associated's favor. The new distributor in *Northwest Power* held only slightly more than *half* of the market share that had been held by the previous distributor-plaintiff. In contrast, Page now enjoys at least the *same*[18] market share as that formerly held by Associated. More important, there was evidence that the prices Page charged its customers, as well as its profits, went up dramatically from those prices charged and profits taken by Associated;[19] plaintiff in

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[17] Our finding that Page was a probable entrant is not foreclosed by the fact that there had been no other new entrants since 1969. No other company had Page's close ties with Grumman.

[18] We are chary of placing too much emphasis on exact percentage figures regarding this market. Although Page had garnered 64% (7 out of 11) of all G-II outfittings in the first half of 1977, we note that a single plane can make an enormous difference in the percentages. Thus, we prefer to view Page's share as substantially equal to Associated's pre-1973 share.

[19] Contracts were introduced relating to the sale and outfitting of the last nine G-II's completed by Associated prior to September 1, 1973. The cost to the customer for total outfitting averaged just under $823,000 per plane, with the avionics outfitting price to the customer averaging $596,000, or 72%, of the total price. Associated's profit averaged about $52,000.

Plaintiffs introduced evidence of the total outfitting prices to customers of nine G-II's outfitted by Page after 1973. The average sale price was $1,010,220. This reflects an average price increase to the customer of $187,600 per plane after Page entered the market. While there was no testimony regarding the sales prices charged by Page for avionics alone, we note that 72% of the average total price is $727,358, a figure far higher than, the

Northwest Power proved no excessive profits or prices. The evidence of foreign bribery, the fact that Page was the only outfitter in 1973-77 to install avionics in the 14 new G-II's belonging to foreign governments, and the testimony that an outfitter requires two or three contracts per year to remain competitive in the market could allow the jury to infer that improper conduct by Page, not competition on the merits, effectively foreclosed a competitive market share to another G-II outfitter. In short, Associated demonstrated that Page has the kind of "dramatic market power," 576 F.2d at 89, that was lacking in *Northwest Power* and that allows the jury to draw an inference of anticompetitive effect.

As additional support for our holding, we point out that the *Northwest Power* case distinguished the case of *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967), *cert. denied*, 390 U.S. 904, 88 S.Ct. 816, 19 L.Ed.2d 870 (1968). In *Cherokee Laboratories*, defendant, although a new entrant in the distribution market, possessed great market power because it had an exclusive dealing arrangement with the holder of a patent. This control of supply made defendant a potential monopolist, and defendant's market power

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pre-1973 prices. Plaintiffs' expert testified that Page's net avionics profit would average about 70% of the total price, or $117,667, on those nine post-1973 planes, a figure more than double the per plane profit enjoyed by Associated. Of the nine sales avionics by Page in evidence, six were installed in planes belonging to foreign governments; Page's avionics profits on these sales were even greater, averaging $158,417, more than three times the profit taken by Associated.

Page complains that comparisons between its sales prices and profits and Associated's is meaningless because the price varies enormously with the amount of equipment ordered by the purchaser. However, Page did not introduce any evidence that the nine of its sales chosen by Associated to compare with Associated's sales and profits were nonrepresentative of its sales prices and profits generally.

was shown by its raising of prices to plaintiff. Here defendant Page had an exclusive dealing arrangement with Grumman and demonstrated its market power by raising prices to *consumers*.

Defendants complain about the court's charge to the jury, contending that it failed adequately to instruct them on the necessity of finding injury to competition. We believe the charge, some of which is set out in the margin,[20] when viewed in its entirety was adequate to withstand a challenge under *Northwest Power*.

Since we hold that Page could not have acquired Associated legally under the antitrust laws and that the acquisition *plus* its anticompetitive conduct afterwards had the requisite anticompetitive effect, we need not reach the issue whether business torts,[21] standing alone, can ever rise to the level of section 1 violations.

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[20] Instruction 37: The requirement that the restraint of trade be unreasonable is referred to as the "Rule of Reason" test of illegality. You are instructed therefore that "restraint of trade" as used in Section One of the Sherman Act applies only to unreasonable restraints and not to all possible restraints of trade. The antitrust law seeks to maintain free competition in interstate commerce, in order to protect the public interest. The end sought by the antitrust law is the prevention of unreasonable restraints in business and commercial transactions which tend to restrict production, raise prices, or otherwise control or affect the market to the detriment of purchasers or consumers of goods and services; the public is to be protected in order to secure to them the advantages which accrue to them from free competition in the market. Not all restraints of trade are unreasonable restraints. All business affects trade in some way. Therefore, in determining whether a "restraint of trade" exists, you must decide whether the conduct which you have found tends to restrict or otherwise control free and open *competition*. And in determining whether or not such an unreasonable restraint exists, you need not find a specific injury, but you must find that the conduct tends or is reasonably calculated to prejudice the public interest.

(Emphasis added).

[21] *See* n. 23, *infra*.

Section 2 Violations

In their argument regarding the jury finding of Section 2 violations, defendants state in their brief:

> The *Pick-Barth per se* doctrine has no more validity under section 2 than under section 1 [citing Cooper, *Attempts and Monopolizations: A Mildly Expansionary Answer to the Prophylactic Riddle of Section 2*, 72 Mich.L.Rev. 373, 454-55 (1974); 3 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 737, 828a, 828b (1978)]. Section 2 offenses cannot be based solely on tortious harm to a single competitor; a plaintiff must show in addition "significant and more-than-temporary harmful effects on *competition*" [citing P. Areeda & D. Turner, *id.* ¶ 737b at 278 (emphasis in original)].

Furthermore, defendants assert that "Page, whatever its share of a 'G-II outfitting market,' did not have and does not have monopoly power, and could not have remotely anticipated that the alleged torts would give it any power over price in the outfitting of G-II aircraft."

We think the discussion regarding section 1 violations, *supra*, refutes most of defendants' arguments here. We have held that there were significant and more-than-temporary harmful effects on competition, shown in part by the rise in prices charged to customers and the rise in Page's profits over the profits Associated took. We also note that this market was not infinite and that Grumman at the time of trial could be expected to produce only about 70 more aircraft, thus rendering new entry then almost impossible in light of the difficulties faced by such a new entrant in recouping startup costs and ascending the learning curve in the remaining four years of G-II production.

Moreover, we have examined the treatise cited by defendants' brief and reached the conclusion that some

unfair business practices *can* be exclusionary.[22] For example, the authors of the treatise state that influencing, inducing, or persuading buyers to specify features of a product that only one company can provide effectively forecloses rivals from competition but that generally there is no impropriety in such persuasion or influence. 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738b at 279-80. The authors, however, go on to imply that if buyers were influenced or induced in an improper manner, through bribes or similar practices, this might constitute an exclusionary practice in violation of section 2. *Id.* at 280. Areeda and Turner seem to say that bribes and similar practices are somewhat different from mere misrepresentations of one's own or a rival's product. *Id.* Relevant here is the evidence of foreign bribes. Also pertinent is the domestic contract awarded to Page at $10,000 over the highest bid and the permissible inference that such a contract was the result of improper influence.

Areeda and Turner are adamant in their view that the mere hiring away of employees from a rival is *per se* legal under the antitrust laws and emphasize "the importance of protecting the employee's opportunities for marketing his talents." *Id.* at ¶ 783d at 281; *see also* ¶ 702. However, they go on to state, "No similar virtue would redeem efforts to induce such disloyal performance by a rival's employee as disclosure of trade secrets or other private information; [or] steering customers, researchers, or others away from his employer and to the monopolist." *Id.* ¶ 738d at 281. The authors imply that such practices would be grounds for section 2 liability if the actual effect was significant. We believe that to be the case here, since the effect was to allow entry through

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[22] Unfortunately, this will be cold comfort to one of the authors of the treatise, Donald Turner, who happens to be one of Page's able attorneys on appeal.

absorption of the most significant competitor by one who possessed great economic power. We note defendants' contention that the engineering drawings and data were not trade secrets, since they could be obtained from Associated's customers, each of whom were required to keep at least one copy of the avionics diagram in the aircraft for servicing purposes. Without deciding this question, we note merely that the jury was presented with conflicting evidence on this point. Certainly, the evidence of Page's conduct concerning Associated employees, especially Chapin, allowed the jury to find that gross impropriety had occurred.

Again, in paragraph 738e of the treatise, the authors discuss the general proposition that it is not an antitrust offense to obtain information from a rival's supplier about "the quantity or nature of shipments to or from the rival." Nevertheless, there are again exceptions to the authors' general premise:

> There may be instances in which the means used by the monopolist are unlawful or otherwise clearly improper. For example, the monopolist might "bribe" the supplier's employee who is thus induced to act in his personal interest and not in his employer's interest. Such improprieties can be exclusionary for § 2 purposes whenever they have a significant impact upon the competitive vitality of the rival.

Id., ¶ 783e at 282. Since there was evidence of a "loan" from Page to Grumman's director of international sales and of a later contact by a Page officer with the Grumman employee, after which a Grumman customer withdrew its outfitting contract from Associated, the jury could infer that the Grumman employee was bribed and that the employee acted in his own self interest. The loss of one outfitting contract when the evidence tended to show that as few as two contracts per year would keep a company in the market would have a significant impact upon Associated's competitive position.

There was evidence that tended to show that defendant Page, by filing allegedly sham suits in federal and state courts, attempted to withhold from Associated money actually owed to it. The amounts owed were substantial and undoubtedly had a significant impact on Associated's financial situation. In their treatise, Areeda and Turner state that abuse of the litigation process can be an exclusionary practice in some instances. *Id.*, ¶ 738j at 284-85.

Finally, Areeda and Turner in their paragraph of concluding comments sum up their theories about unfair competition *vis-a-vis* the antitrust laws and reiterate several cautionary notes:

> First, antitrust law must be sensitive to the monopolist's "right" to protect himself and to compete vigorously in ways generally allowed. Second, antitrust laws must be concerned lest the mere possibility of an exclusionary tendency permit interminable lawsuits inquiring into the "reasonableness" of every utterance or "ordinary" act of the monopolist. Third, to keep analysis manageable, the courts should be willing to adopt presumptions of propriety with respect to some minor acts that might conceivably be exclusionary. To force the inquiry, the plaintiff must be required to make a significant preliminary showing of impropriety. Fourth, the concept of "exclusionary" practice would become totally unmanageable unless the judges are willing to adopt a de minimis test and to ignore those practices that seem unlikely to have made a substantial impact upon the achievement, maintenance, or expansion of monopoly power. Fifth, those who disagree with these observations are bound to reexamine the rationale for looking at so-called exclusionary practices at all. Intellectual honesty should compel antitrust law to acknowledge that it is either (1) looking for a significant causal connection between power and challenged

> behavior or (2) condemning monopoly power as such (with possible exceptions). If the latter is the law's object, it should do so cleanly without burdening plaintiffs, defendants, courts, and society with a meaningless but endless charade searching for bad practices.

Id., ¶ 739 at 287 (footnote omitted). We agree with the authors that a *de minimis* rule should be applied by our courts, but we believe that Associated's evidence in this case, which the jury evidently believed, was probative of enough instances of exclusionary behavior on the part of defendants to constitute far more than *de minimis* violations of section 2. Moreover, Areeda and Turner recognize, in their discussion of the section 2 offense of attempting to monopolize, that conduct violative of section 5 of the FTC Act, proscribing unfair competition, can at times be exclusionary under section 2. *See id.*, ¶ 830b.

Probably no one of the instances of improper conduct,[23] standing alone, would lead to section 2 liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict. Certainly, the Sherman Act encourages even rough-and-tumble competition *on the merits*, but Associated's evidence would allow the jury to infer that Page's overall success was influenced by factors other than the superiority of its products and services.

The jury instructions[24] on section 2 were substantially

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[23] We wish to emphasize that we have not held that any specific *torts* were committed. We simply find that there was sufficient evidence for the jury to have found exclusionary conduct.

[24] The court's charge on § 2 reads, in pertinent part:

> To monopolize means to unlawfully acquire monopoly power, that is, the power to control prices or to exclude competition in the relevant market. The first thing that characterizes a monopolist is the power to control prices. A monopolist can control the price of its goods and force the sellers of like

goods throughout the market to conform to its prices. The second thing which characterizes a monopolist is the power to exclude competition from the market. By "power to exclude competition" I mean the power to prevent other businessmen from opening and thereafter profitably engaging in the business involved or sufficient power over the customer's alternatives that other competitors can be excluded from competing in the relevant market.

It is not enough that one company is stronger and more successful than a competitor and may eventually drive a competitor out of business. After all, all competition is a battle for trade, and in each sale one competitor must necessarily lose.

It is only the power to exclude competitors from a market or control prices that violates the antitrust laws. Before you consider whether these defendants have monopoly power as stated in the previous paragraph, you must determine the relevant market applicable to this case pursuant to Instruction Number 39. In determining if Page Airways and Page Gulfstream actually possessed the power to control prices or exclude competitors a most important factor is the size of the market share held by defendant. The larger the market share of the defendant, the more likely that he will be able to control prices or exclude competition. In addition, you may also consider the number and size of other competitors in the relevant market, the ease or difficulty with which new competitors may enter into the market, whether the market share of the defendants has increased or declined and whether competition in the market has become more or less concentrated, that is, whether the number of competitors is growing smaller while their market shares are growing larger.

Before you can determine if defendants have violated Section 2, you must determine what is the relevant market pursuant to Instruction Number 39 as well as whether defendants possess monopoly power. If you find that defendants possess monopoly power, I caution you that this by itself is not sufficient to find an antitrust violation.

Instruction 41. The offense of monopolization under Section 2 has two elements: (1) The possession of monopoly power in a relevant market and (2) the willful acquisition or main-

tenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. In addition to the possession of monopoly power, you must also find, in order to hold that defendants violated Section 2 of the Sherman Act, that this power was willfully acquired. The mere possession of monopoly power is insufficient to constitute an antitrust violation. A company may grow very large and thus achieve some power to influence prices and competition in the market. If the company achieves its power through purely legitimate means, that is, growth or development as a consequence of a superior product, business acumen, or historic accident, then it has not violated the antitrust laws.

In this case, plaintiffs have argued that defendants' monopoly was acquired through a series of acts calculated to drive Plaintiff [Associated] out of the market.

In response defendants deny that they have monopoly power, or, if they have it, they deny that such power was unlawfully acquired. Defendants further deny that any of their actions were done with an anticompetitive motive or by virtue of any agreement. If you believe that the defendants' actions do not demonstrate a willingness or purpose to exclude competition or were not responsible for a monopoly, then you will not find that defendants have unlawfully monopolized in violation of Section 2 of the Sherman Act. If, however, you believe defendants or any of them possess monopoly power and that such power was willfully acquired, you should find that such defendants have unlawfully monopolized in violation of Section 2 of the Sherman Act.

Instruction 42: The offense of "attempt to monopolize" also has two essential elements: (1) Specific intent to monopolize; and (2) some act or acts done in furtherance of an intent to monopolize, which, although insufficient to actually produce monopoly power creates a dangerous probability that monopolization will occur. In order to find an attempt to monopolize, both elements—the intent and the act or acts—must appear and together they must result in a dangerous probability that the defendant will achieve a monopoly of the relevant market. It is not necessary, however, in order to constitute an attempt to monopolize that the defendants' action actually succeed in achieving monopoly power.

In deciding the question of whether there has been an attempt to monopolize, you are instructed that the phrase

"specific intent" means more than merely an intention to engage in any act. It means, therefore, plaintiffs must prove by a preponderance of the evidence, that the defendants specifically intended to injure or destroy competition or control prices. Accordingly, the evidence that any particular act was engaged in by the defendants would not be sufficient in and of itself on the issue of an attempt to monopolize unless you find that such act was done by reason of a specific intent to injure or destroy competition or to control prices.

Instruction 43: As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly committed. With respect to the issue of intent, the jury is entitled to consider any statements made or acts done or omitted by defendants, and all facts and circumstances in evidence in the case which may aid determination of state of mind. If you find that the defendants in their business practices were predominately motivated by legitimate business aims and that there was no specific intent to control prices or to injure or destroy competition in an appreciable part of trade or commerce, then you would find against the plaintiffs on the question of an attempt to monopolize. However, if you find that it was more likely than not that the defendants' actions were motivated by their desire to acquire monopoly power by means other than free competition and if you find it more likely than not that there was a dangerous probability that monopoly would be achieved, then you would find in favor of the plaintiffs on an attempt to monopolize claim.

Instruction 44. With reference to the offense of conspiracy to monopolize, it is necessary for the plaintiffs to prove by a preponderance of the evidence that (1) there was a conspiracy; (2) the object and purpose of the conspiracy was or is to achieve monopoly power; and (3) that there was or is specific intent to injure the plaintiffs as well as competition. I have already defined for you the meaning of a conspiracy in our discussion of Section 1 of the Sherman Act. That definition is applicable here. However, unlike Section 1, a conspiracy to violate Section 2 must be a conspiracy to obtain monopoly power, that is, the power to exclude competition or control prices rather than to merely restrain competition, as in Section 1.

For the offense of conspiracy to monopolize, it is not necessary to demonstrate that the goal of monopoly power was or will be achieved.

correct. Defendants argue that they could not be found guilty of monopolizing as a matter of law, since their market power was insufficient to support such a charge. They further contend that since the jury found that they had monopolized, attempted to monopolize or conspired to monopolize, the verdict under section 2 cannot stand because it cannot be ascertained whether it rests on an impermissible ground. To be sure, Page's market power did not rise to the level existing in some cases that find actual monopolization. *See, e.g., United States* v. *Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). However, when Page's market share is viewed alongside the evidence of the number of actual competitors, the high barriers to entry, the limited number of G-II's remaining at the time of trial to be produced, and Page's power over price, we believe the court below correctly submitted the issue to the jury. *See Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). "The relative effect of percentage command of a market varies with the setting in which that factor is placed." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528, 68 S.Ct. 1107, 1124, 92 L.Ed. 1533 (1948). *See also* L. Sullivan, *Antitrust* §§ 22-32 (1977).[25]

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[25] If we had held that the issue of monopolization should not have been submitted to the jury, we could not allow the general verdict on section 2 liability to stand, even though there was sufficient evidence on attempt and conspiracy. *See Sunkist Growers, Inc.* v. *Winkler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S.Ct. 1130, 1135-1136, 8 L.Ed.2d 305 (1962); *Smith* v. *Southern Airways, Inc.*, 556 F.2d 1347 (5th Cir. 1977); *but see Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1304 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) (where the evidence was sufficient to create a jury question on monopolization, a verdict identical to the one at issue here could stand without our deciding whether

In conclusion, we wish to reiterate here our holding in *Northwest Power*: "Single damages or equivalent injunctive relief is thought sufficient to compensate a firm for unfair competition." 576 F.2d at 89. This opinion should not be read to encourage all who suffer injury to business or property through an alleged business tort to bring suit under section 1 or 2 of the Sherman Act. The holding of this case rests on a narrow foundation, and only those cases coming within the ambit of these particular facts should be considered.

Evidentiary Rulings

Since we held in our foregoing discussion of section 2 violations that evidence of bribery of customers' representatives or of the employee of the supplier, viewed in the context of evidence of other exclusionary conduct, could be probative of a section 2 violation, we reject defendants' contention that this evidence was irrelevant. We think plaintiffs made the requisite preliminary showing that the bribes had an effect upon competition; thus, the trial court was correct in denying defendants' motion in limine. The fact that the evidence was highly inflammatory merely requires the trial court to employ the balancing test under Fed.R.Evid. 403. We are not convinced that the trial court abused its discretion here, and we sustain its rulings.

Defendants also attack the trial court's rulings regarding the admission of evidence of defendants' lawsuits against plaintiffs. This issue was fully considered by the trial court in its earlier opinion in this case. *See* 414 F.Supp. 1088, 1094-96. The gist of that opinion is that evidence of the lawsuits was relevant since plaintiffs alleged that they were brought not for a proper purpose

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the evidentiary requirements regarding attempts and conspiracies were met). Even so, the damage award would still be supported by the jury's verdict on section 1 liability.

but for the purpose of achieving an unlawful objective—*i.e.*, to destroy plaintiffs by strangling plaintiffs' source of funds. We agree with the district court that the *Noerr-Pennington* doctrine [26] does not extend first amendment immunity to such abusive acts. *See id.* at 1096. It should be noted that the district court required plaintiff not only to show that the defendants had an illegal purpose in filing the lawsuits but that defendants also committed specific acts, other than those incidental to the normal use of the courts, directed at attaining the illegal objective. *Id.* We agree with that analysis and that requirement.

The Jury Charge

We are convinced from a careful reading of the entire charge that it was, in substance, correct. Defendants contend that the jury was given little or no guidance on how to evaluate the various allegations of improper conduct. We disagree. The pertinent parts of the charge [27] adequately cover defendants', as well as plaintiffs', contentions regarding the improper conduct.

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[26] *See Eastern R. R. President's Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

[27] Instruction 52: This completes my instructions with respect to the antitrust law as it applies to this case. There are, however, additional instructions of law which must be given which relate to whether some of the evidence introduced by plaintiffs really supports their antitrust claims. For example, the plaintiffs claim that defendants filed, or caused to be filed, two legal proceedings in San Antonio with the intent to economically coerce the plaintiffs. This is a serious allegation because the First Amendment of the United States Constitution guarantees all of us the right to petition our government including the courts. We would all, I am sure, be less likely to invoke our right to petition the court if the assertion of that right always carried with it the dangerous possibility that we would later be sued for asserting that right. However, the

First Amendment does not shelter those who abuse the judicial process.

The plaintiffs claim that the defendants abused the judicial processes in two ways. First with respect to the legal proceeding whereby the defendants obtained from a state court judge in San Antonio an ex parte injunction which required Mr. Lanford to remove his camper from the Dee Howard hangar, the plaintiffs contend that the defendants caused the state judge to rule as he did by making material misrepresentations.

A material misrepresentation is defined as a false representation made with the knowledge or belief on the part of the declarant that the representation is false with an intention to induce the court to act or to refrain from acting in reliance upon the misrepresentation and there is justifiable reliance upon the misrepresentation on the part of the court in taking action or refraining from it. If you find that the representations made to the San Antonio court by the defendants or any of them in inducing the court to issue an ex parte injunction were material misrepresentations under the above definition, then you must decide whether these material misrepresentations were made with the intent to economically coerce the plaintiffs.

For your information, the term "ex parte" injunction action means, in this context, a judicial proceeding where action is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by any other person adversely interested.

If you find that material misrepresentations were made to the court and that these material misrepresentations were made with the intent to economically coerce the plaintiffs, the fact that the defendants filed this ex parte injunction action would be evidence supporting plaintiffs' antitrust claims. However, if you find that no material misrepresentations were made or, even if material misrepresentations were made, that they were not done with the intent to economically coerce the plaintiffs, then you must disregard completely the evidence presented to you with respect to the ex parte injunction action in San Antonio.

Related to the ex parte injunction proceedings is an interpleader suit filed by the defendants against plaintiffs in San Antonio. Again, this interpleader proceeding is normally protected from scrutiny within the context of this lawsuit, by the First Amendment. You are instructed that an interpleader action is defined as follows: When two or more persons claim the same thing (or fund) of a third, and he, laying no claim to it himself, is ignorant which of them has the right to it, and reasonably believes he may

be prejudiced by their proceeding against him to recover it, he may file a proceeding against them, the object of which is to make them litigate their claim between themselves, instead of litigating it with him and such an action is called an interpleader action. However, the plaintiffs again contend that defendants abused the legal process in filing this interpleader action. Thus, plaintiffs say that this suit was not for the purpose of pursuing the legitimate purposes of an interpleader action but was filed with the intent to economically coerce the plaintiffs by tying up funds owed to them. You are instructed that for the purpose of determining whether an abuse of process occurred in this interpleader action that an abuse of process means the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so. The only ulterior motive at issue here is the plaintiffs' allegation that the defendants were trying to economically coerce plaintiffs by tying up monies owed to them. If you find from a preponderance of the evidence that this interpleader action was instituted not for the legitimate purposes of an interpleader suit as I have just defined it but for the purpose of economically coercing the plaintiffs then you may consider the filing of this interpleader action as evidence in support of plaintiffs' antitrust claims. If you find to the contrary, you must disregard all evidence concerning the interpleader suit as it is protected from the scrutiny under the First Amendment.

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Instruction Number 54: The plaintiffs contend that defendants furthered their anticompetitive scheme through the practice of "commercial bribery." There is a distinction to be made between commercial bribery of domestic corporations and citizens on the one hand and foreign officials on the other. I want to instruct you first with respect to the law on domestic commercial bribery.

"Commercial bribery" generally is a practice whereby one company obtains business by making secret payments to an employee of another company who in return steers business to the briber. Specifically, a commercial bribe is a secret payment made to an employee of one corporation for that employee's personal benefit by an employee of another corporation for the purpose of having the bribed employee use his influence to cause his corporation to favor the other corporation in preference to the other competitors. In our competitive system it is assumed that many companies will complete [sic] for business and will obtain that business based upon their own merit such as a superior product, lower price, and/or quick, efficient delivery and service. The practice of commercial bribery, however, distorts this competitive process as the business

is awarded not on merit but through the corrupting of the buyer's employees. If you find from a preponderance of the evidence that any or all of the defendants engaged in commercial bribery, this evidence would support the plaintiffs' antitrust claims.

I further instruct you that a loan to an employee of a company from which business is obtained may or may not be a commercial bribe, depending upon the intent of the parties. If the parties genuinely regard the transaction as a loan and intend that the money should be repaid, then no commercial bribe has occurred. Finally if the defendants did not intend to offer to pay a commercial bribe, then you may not find that a bribe was made or offered even if you believe that the recipient of the favor took it to be a bribe. The intent of the parties in this case is a question which you must decide on the basis of the evidence presented to you.

Instruction 55: Plaintiffs have also alleged that Page Airways, Page Gulfstream and Mr. Juston collectively or individually bribed Mr. Chapin and/or Mr. Hamilton and other of plaintiffs' employees. A bribe in this context again means that secret payment made to an employee of one corporation for that employee's personal benefit by an employee of another corporation with an improper or corrupt motive. If you find that any one of the defendants bribed Mr. Chapin or Mr. Hamilton or any other of plaintiffs' employees, you must further decide whether it was for an anticompetitive purpose.

You are further instructed that it is not improper for an employee to work for and accept money from two employers at the same time if both employers are aware that such a relationship exists and agree to that arrangement. Moreover, it is not improper for an employee to make arrangements to compete with his employer before the termination of his employment, so long as he does not use his employer's time or any trade secrets in so doing and further that he does not breach his duty of loyalty to his present employer. You are instructed that "trade secrets" means any formula, pattern, device or compilation of information which is used in one's business and which gives one opportunity to obtain advantage over competitors who do not know or use it.

You are instructed that it is undisputed that the plaintiffs and the defendants in this case were from 1968 until June, 1973, engaged in a cooperative venture whereby each played a role in the outfitting of planes for the mutual benefit of all. It is entirely possible, therefore, that the employees of one would assist the employees of the other from time to time as the need arose in the

furtherance of the joint effort. This conduct alleged by the plaintiffs is not improper if the respective employers knew about the arrangement and gave it their consent.

Furthermore, you may find that during the period from June of 1968 until June of 1973, when the agreement between the parties was in effect, that defendants paid employees of the plaintiffs money. Such conduct would not be improper so long as the money was paid for work done on the projects that both plaintiffs and defendants had a mutual interest in completing, and the money was not paid to encourage plaintiffs' employees to do acts detrimental to the interest of the plaintiffs. However, you may find that the money was paid to encourage plaintiffs' employees to do acts detrimental to the interest of the plaintiffs, and this would fall under the definition of commercial bribery.

Finally, you are instructed that after the agreement between the plaintiffs and defendants came to an end in June, 1973, there was a period of transition during which those who had previously worked together had to adjust their relationships. If, therefore, you find that some employees of plaintiffs did work for the defendants because of an honest mistake as to their proper duties, or because of the confusion during the transition period or because such employees honestly believed they would be terminated by plaintiffs and did such acts, as they did, to further their own employment prospects with the defendants, this would not be evidence in support of plaintiffs' claims unless you find from a preponderance of the evidence that defendants encouraged or ratified this conduct.

Instruction 57: Next, we come to the issue of foreign bribery. If you find that the defendants have engaged in commercial bribery of foreign government officials, this may be evidence of: (1) The willful acquisition or maintenance of monopoly power or; (2) an act performed in furtherance of an attempt to monopolize or; (3) an act performed in furtherance of a conspiracy to monopolize; or (4) an unreasonable restraint of trade. However, before you may consider this as evidence of any or all of the foregoing antitrust violations you must find: (1) This foreign commercial bribery is not an accepted industry practice in the foreign market and is not illegal under the law of that foreign country which defendants must prove to you by a preponderance of the evidence and (2) it was not compelled by a foreign government or a foreign government official which defendants must prove by a preponderance of the evidence. By "compelled" I mean that the "foreign bribe" is a cost of doing

business in the particular country and failure to make the payments results in the competitor inevitably losing the business. The fact that I have instructed you with respect to the foreign bribery issue does not mean that I have a view on the matter one way or the other or that foreign bribery has been established.

The defendants contend that no foreign bribery occurred. Their position is that it is "quite common for a foreign government to deal through an intermediary when making a purchase of goods and equipment outside of its own country," and to pay commissions to that foreign intermediary is usual and legal.

A bribe, on the other hand, is a secret payment made to foreign government official for that official's personal use and for the purpose of having that official use his official influence to cause his government to choose the briber's product over that of a competitor.

The State of Sabah is governed by the laws of Malaysia. Under Malaysian law it is a crime for a public servant to take gratification other than legal remuneration in respect of an official act. The pertinent part of the statute reads: Article 161:

"Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept or attempt to obtain, from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official function favor or disfavor to any person, or for rendering or attempting to render any service or disservice to any person, with the Government, or with any member of the Cabinet or of Parliament, or of a State Executive Council or Legislative Assembly, or with any public servant, as such, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."

Explanation: Expecting to be a public servant. If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offense defined in this section.

Gratification: The word gratification is not restricted to pecuniary gratification, or to gratifications estimable in money.

"Legal Remuneration." The words Legal Remuneration are not restricted to remuneration which a public servant can lawfully

demand, but include all remuneration which he is permitted by law to accept.

"A motive or reward for doing." A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

You are instructed that the law of Uganda is as follows:

Any person employed in the public service who directly or indirectly agrees or offers to permit his conduct in such employment to be influenced by the gift, promise, or prospect of any property or benefit to be received by him, or by any other person from any person whomsoever is guilty of a misdemeanor and is liable to imprisonment for three years.

Any person who endeavors directly or indirectly to influence the conduct of a person employed in the public service in respect of the duties of such employment by the gift, promise or prospect of any property or benefit to be received by such person employed in the public service, or by any other person, is guilty of a misdemeanor and is liable to imprisonment for three years.

Any person, who, being employed in the public services takes or accepts from any person for the performance of his duties as such officer any reward beyond his proper pay and emoluments, or any promise of such rewards, is guilty of a misdemeanor and is liable to imprisonment for three years.

Any person who, being employed in the public service, receives any property or benefit of any kind for himself, on the understanding, express or implied, that he shall favor the person giving the property or conferring the benefit, or anyone in which that person is interested, in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or anyone in whom he is interested, and any person employed in the public service, is guilty of a misdemeanor and is liable to imprisonment for six months.

If plaintiff proves to you by a preponderance of the evidence that the defendants bribed foreign officials in either Sabah or Uganda, then you must decide from a preponderance of the evidence whether this is an accepted industry practice in the relevant market.

If you find from a preponderance of the evidence that this is not an accepted industry practice then you must decide whether defendants have proved from a preponderance of the evidence that the foreign government compelled these payments. If defendants have not proved this defense then you may consider such "foreign bribes" as you have found as evidence of the various monopolization claims which you have already been instructed on.

Damages

Given our conclusion that defendants' hiring away of Associated's key employees and its copying of the engineering diagrams and STC's would have been illegal had it been attempted as a buyout or merger, we believe that Associated should be allowed to base its damage calculations on assumptions that included the continuing services of Ross Chapin and its continued exclusive use of the engineering drawings and STC's. There was evidence that plaintiffs' average profit per sale of avionics in 1973 was about $52,000. Plaintiffs' expert, Dr. Block, projected lost earnings based on Associated's retaining its 51.6 percent share of the market and on an average per plane profit of $55,000. It is defendants' view that the profit figures should have been based on Associated's experience in the years 1969-73. However, some of those years reflected the growing pains of a new business, and the jury was entitled to consider just the last year in which Associated installed G-II's before the contractual breakup. Furthermore, we consider Dr. Block's projections to be fairly conservative, since they were based on an assumption that Grumman would produce only 250 G-II's, while the evidence shows that Grumman now intends to produce about 270, and since plaintiffs' evidence showed that Page's avionics profits on nine aircraft it outfitted after 1973 averaged $117,667, more than double the per plane average profit figure espoused by Dr. Block.

In short, we think the jury verdict that was based on plaintiffs' damage projections was supported by relevant evidence. The damages were not based on mere speculation or guesswork, *see Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946), and the expert's assumptions were supported by the evidence introduced at trial. *See Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 984 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978).

Defendants contend that the trial court erred in not telling the jury to examine carefully Dr. Block's assumption that Associated would continue to receive all its former share of the G-II outfitting business despite the lawful termination of the contract between it and Page and despite competition from Page. However, the fact of the termination of the contract was before the jury, as were Page's attempts to enter the market. The jury could have reasonably inferred that, absent the improper conduct by Page, Associated would have continued to receive approximately half of all G-II avionics outfitting contracts, in light of Ross Chapin's extensive customer contacts built up during the Associated-Page venture.

Standing of Associated Radio Company

The trial court granted judgment n.o.v. in favor of defendant on the claim of Associated Radio Company ("Radio") based on Radio's lack of standing to sue, holding that Radio's injury flowed merely from its position as creditor and supplier to Associated. We agree with the trial court's action for two reasons. First, while there was ample evidence for the jury to infer that there was a separate market for the sale and installation of avionics equipment *in* G-II airplanes, there was *no* evidence that a market existed that was limited to the sale of G-II avionics equipment *to* companies like Associated. The fact that Radio tended to concentrate its sales to G-II installers (that is, Associated) is not probative of the existence of a separate market. It may only reflect a business choice made by Radio to so limit its business. We find no evidence concerning the companies with which Radio competed, the range of other products that these companies sell, or the identity or nature of their customers. In short, Radio totally failed to prove that there was a separate market for the sale of avionics to installers who concentrated on the G-II aircraft.

Second, we agree that the only damages Radio proved "resulted from the ripple effect caused by defendants' actions against plaintiff [Associated]." Radio showed only that it had lost business from its customer, Associated, which in turn was restrained in its sale and installation of G-II avionics. Under this proof, Radio lacked standing to sue. *See Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *Jeffrey* v. *Southwestern Bell Telephone Co.*, 518 F.2d 1129 (5th Cir. 1975); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 393-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717 (1963).

Radio vigorously contends that it had standing to sue and suffered antitrust injury because some of defendants' actions were aimed directly at it. However, under the target area test, a plaintiff must show more than animus directed toward it and resulting injury; it must show that its business or property interests exist in the "area of the economy" that is endangered by a "breakdown of competitive conditions" caused by the defendant. *Jeffrey* v. *Southwestern Bell Telephone Co.*, 518 F.2d at 1131. Here the affected area of the economy was the business of installing avionics systems in G-II aircraft. If any other area was affected, Radio failed to prove it. Since Radio did not function in the outfitting business but merely sold avionics equipment to outfitters, it cannot recover under the antitrust laws and our case law. Thus, we approve the trial court's granting of judgment n.o.v. for defendants with regard to Radio.

The Case Against Defendant Hamilton

We find as a matter of law that the evidence of defendant Edwin Hamilton's conduct, even if entirely credible, will not support the judgment against him. The case against Hamilton rests on two alleged instances of misconduct. First, Hamilton accepted a Christmas bonus

from Page in 1972 while he was still on Associated's payroll. Second, he assisted Page in its efforts to lease office space in San Antonio and in purchasing the office's furniture, obtaining a miniwarehouse for Page to store equipment, and setting up the telephone system. There was no evidence that Hamilton assisted with the copying of the engineering drawings that Associated had developed or with any other acts detrimental to competition. Moreover, Hamilton was not shown to have participated in any commercial bribery or allegedly sham lawsuits. We reiterate that *all* of this conduct, taken together, rose to the level of a section 2 violation and that isolated acts, standing alone, did not. Thus, the judgment against Hamilton is reversed.

AFFIRMED in part and REVERSED in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-7838-F

ASSOCIATED RADIO SERVICE CO. and
ASSOCIATED RADIO CO.

vs.

PAGE AIRWAYS, INC., PAGE GULFSTREAM, INC., DOUGLAS JUSTON, ROSS C. CHAPIN AND EDWIN C. HAMILTON

MEMORANDUM OPINION

I am entering today, contemporaneously with this Memorandum Opinion, a Judgment against all five Defendants in the amount of $9,048,210.00. This judgment reflects several decisions that I have reached regarding motions pending before the Court and I will outline my rulings and findings on these motions below.

Defendants' motion for judgment notwithstanding the verdict with respect to Plaintiff Associated Radio Co.:

At the close of the Plaintiffs' case the Court, in the course of ruling on Defendants' motion for directed verdict, indicated that the motion with respect to Plaintiff Associated Radio Co. would be denied in the interest of creating a record for appeal, but that the Court would be receptive to a motion J.N.O.V. after a jury award, if any. That point has now arrived and I am today granting the Defendants' motion for judgment notwithstanding the verdict insofar as it relates to Plaintiff Associated Radio Co. Thus, the jury award of $550,000.00 to Plaintiff Radio Co. has been omitted from the judgment entered today and a judgment providing that the Plaintiff Associated Radio Co. take nothing is being entered.

I have had doubts from the beginning about Associated Radio Co.'s standing in that Radio Company was in the position of a supplier to Service company and others at the time of the alleged illegal conduct by defendants. After hearing all of the Plaintiffs' evidence I was convinced that, even when viewing the Plaintiffs' evidence in its most favorable light, that there was no evidence that the Defendants intended to eliminate Radio Co. as a competitor, or that Radio Co. was a competitor of Defendants. Radio Co. clearly was injured but this injury resulted from the ripple effect caused by the Defendants' actions against Plaintiff Service Company. The antitrust laws were not meant to compensate this type of indirect injury. *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) quoting with approval *Volasco Prods. Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. den'd*, 372 U.S. 907 (1963).

Defendants' motion for judgment notwithstanding the verdict as to other claims and parties:

After careful consideration at this stage of this case and having previously considered most of these contentions at the directed verdict stages the Court is of the opinion that the motion should be DENIED.

Plaintiffs' motion for award of attorney's fees:

On September 30, 1977, a hearing was held in court at which time evidence was presented on the Plaintiffs' motion for the award of attorney's fees. Section 4 of the Clayton Act (15 U.S.C. § 15) provides that a reasonable attorney's fee may be awarded to a prevailing Plaintiff in a private antitrust action such as this. The award is mandatory and is made to the party plaintiff and not to the Plaintiffs' attorney. In making this award the Court must: (1) determine the nature and extent of the services rendered; (2) evaluate them upon reasonable and comparable hourly rates for similar services in the area

where they were performed; (3) adjust the amount of fee based on hourly rates to include such additional amounts, if any, as the Court finds reasonable upon full consideration of each of the relevant factors for which compensation above that based solely on hourly rates may be properly awarded.

When a Court seeks to provide compensation above the reasonable hourly rate several factors are relevant. These factors are (1) prior government investigation, indictment or criminal prosecution of which there was none in this case; (2) related civil actions of which there were several in the State Courts but which I find were not included in the requested compensation for work done in this case; (3) novel and complex issues of both fact and law of which there were many in this case; (4) likelihood of success or failure which the Court finds the Plaintiffs had no better than a 50% chance of success when they embarked on this litigation; (5) the quality of legal services which the Court finds was extremely high for attorneys Matthews, McCamish, Henderson and Fitzpatrick. These attorneys were the only counsel for Plaintiffs appearing at trial. (6) Preclusion of other employment which the Court finds a relevant factor in this case in that attorneys Matthews and Henderson were almost totally precluded from representing other clients from the date of March 1st, 1977 to the date of the jury's verdict in this case; (7) fixed or contingent fee which the Court finds that the Plaintiffs were to pay a contingent fee of 40% of any judgment recovered in the case but that compensation of $30.00 per hour was paid to the attorneys during the pre-trial stages and the trial itself. This hourly rate was non-refundable in the event of a take nothing verdict but would be applied against the 40% contingent fee in the event of any jury award; (8) nature and length of relationship with clients which the Court finds that there was no prior relationship with these clients and that the attorneys

applying for this fee were approached solely for the purpose of litigating this antitrust case and related state litigation; (9) experience and reputation of counsel of which the Court finds that lead counsel, Mr. Matthews and his first assistant, Mr. McCamish are both partners in law firms and have commanded fees in excess of $100.00 per hour in the past on similar cases; (10) awards in similar cases in which the Court has referred to and relied on *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 245 F. Supp. 258 (D.Pa. 1965), vacated on other grounds, 377 F.2d 776 (3rd Cir. 1967), affirmed in part on other grounds, 20 L.Ed.2d 1231 (1968); *Bray* v. *Safeway Stores*, 392 F.Supp. 851 (N.D. Cal. 1975); *Computer Statistics, Inc.* v. *Blair*, 418 F. Supp. 1339 (S.D. Tex. 1976); (11) risk of litigation of which the Court finds there was substantial risk both for the Plaintiffs and their attorneys.

After reviewing all of these factors, the Court finds a reasonable attorney's fee for the individual attorneys as follows: (1) $379,900.00 for Mr. Matthews; (2) $160,990.00 for Mr. McCamish; (3) $50,800.00 for Mr. Chambers; (4) $152,715.00 for Mr. Henderson; (5) $136,387.00 for Mr. Fitzpatrick; (6) $7,530.00 for Mr. Thorp; (7) $1915.00 for Mr. Hoecker; (8) $350.00 for Mr. Brown; (9) $500.00 for Mr. Ingram. This amounts to a total of $891,087.00 in attorneys' fees. I have reduced this figure by 15%, the degree which the Court finds these attorneys pursued the claims of Associated Radio Co. which have been unsuccessful in this litigation. Accordingly, the amount of attorneys' fee awarded is $757,424.00.

Plaintiffs' motion for expenses: The Plaintiff has moved to recover three items of expenses that is, deposition costs in the amount of $11,379.58, daily transcript in the amount of $29,406.49 and experts' fees for attendance at depositions by Defendants in the amount of

$2,736.30. The first item, that is deposition costs, is not contested by the Defendants and is hereby awarded. The next two items, however, are contested. The Court is of the opinion that the $29,406.49 cost for daily copy should be awarded. The Defendants ordered daily copy in this case and Plaintiffs would have been clearly at a disadtange had they not followed suit and ordered the daily copy. In addition, the daily copy was of assistance to the Court on evidentiary matters during the course of the trial which lasted over two months. *See Advance Business Systems and Supply Co.* v. *SCM Corp.*, 287 F.Supp. 143 (D.Md. 1968), affirmed and remanded on other grounds, 415 F.2d 55 (4th Cir. 1969) *cert. den'd*, 397 U.S. 920 (1970).

The Plaintiffs' petition for the award of expert fees for attendance at depositions taken by Defendants is hereby DENIED.

Defendants Chapin and Hamilton Motion for J.N.O.V.:

Defendants Chapin and Hamilton, in their motion filed October 6, 1977, argue that the evidence conclusively establishes that: (1) both of the Defendants performed their obligations in 1973 on behalf of all parties to the original contracts and that neither Plaintiff requested either of these individual Defendants to cease providing assistance to Page Gulfstream, Inc. in obtaining new outfitting work; (2) neither of these Defendants were [sic] bound to either Plaintiff by written employment agreements or obligations not to compete with either Plaintiff, and therefore each of these Defendants were [sic] entitled to terminate their employment with the Plaintiffs at will and compete with their former employer; (3) both Defendants, as a matter of law, had the right to offer employment to key and other personnel of Plaintiffs whose employment was at will.

The Court has reviewed the record in this case and the arguments of Defendants Chapin and Hamilton in

their motion for judgment notwithstanding the verdict, and believes that the motion should be DENIED as to both Defendants.

It is so ORDERED.

/s/ Robert W. Porter
United States District Judge

DATE October 7, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-7838-F

ASSOCIATED RADIO SERVICE CO. and
ASSOCIATED RADIO CO.

vs.

PAGE AIRWAYS, INC., PAGE GULFSTREAM, INC., DOUGLAS JUSTON, ROSS C. CHAPIN AND EDWIN C. HAMILTON

JUDGMENT

This action came on for trial before the Court and a Jury, Honorable Robert W. Porter, District Judge, presiding and the issues having been duly tried and the Jury having duly rendered its verdict,

It is ORDERED and ADJUDGED: that the Plaintiff Associated Radio Service Co. recover of the Defendants Page Airways, Inc., Page Gulfstream, Inc., Douglas Juston, Ross C. Chapin and Edwin C. Hamilton the sum of Eight Million, Two Hundred Fifty Thousand Dollars ($8,250,000.00) plus a reasonable attorney's fee in the amount of $757,424.00 and expenses in the amount of $40,786.00 for an aggregate amount of $9,048,210.00, with interest thereon at the rate of Nine Percent (9%) as provided by law, and its costs of action;

That the Plaintiff Associated Radio Company take nothing and that its action be dismissed on the merits.

Dated at Dallas, Texas, this 7th day of October, 1977.

/s/ Robert W. Porter
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1159

D.C. Docket No. CA-3-7838-F

ASSOCIATED RADIO SERVICE COMPANY,
Plaintiff-Appellee,

ASSOCIATED RADIO COMPANY,
Plaintiff-Appellant,

versus

PAGE AIRWAYS, INC., *et al.*,
Defendants-Appellants, Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before GEE, FAY and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

IT IS FURTHER ORDERED that costs of plaintiff-appellee be taxed against all defendants-appellants except

Edwin C. Hamilton; costs of defendant-appellees are to be taxed against plaintiff-appellee, Associated Radio Company.

August 29, 1980

Issued as Mandate:

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

November 3, 1980

TEL 504—589-6514
600 Camp Street
New Orleans, La. 70130

GILBERT F. GANUCHEAU
Clerk

TO ALL PARTIES LISTED BELOW:

No. 78-1159—ASSOCIATED RADIO SERVICE;
ASSOCIATED RADIO COMPANY v.
PAGE AIRWAYS, INC., *et al.*

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEAU
Clerk

By /s/ Sally Hayward

Deputy Clerk

cc: Lead Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1304

PAGE AIRWAYS, INC., ET AL.,

Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorneys for Associated Radio Service Company

March 2, 1981

QUESTIONS RESTATED

1. Whether the petition should be granted to review jury instructions which were in substantially the form repeatedly demanded of the District Court by Petitioners and admittedly in conformance with *Brown Shoe Co.* v. *United States.*

2. Whether the petition should be granted to review the jury instructions on "injury to competition" which were given in substantially the form repeatedly demanded of the District Court by Petitioners, but which Petitioners now erroneously claim have created a conflict among Courts of Appeal.

3. Whether the petition should be granted to review jury instructions and a jury verdict adverse to Petitioners under Section 2 of the Sherman Act when the instructions submitted were substantially those requested by Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1304

PAGE AIRWAYS, INC., ET AL.,

Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

The evidence of record on which Respondent based its case and to which the jury gave credence is well summarized in the opinion of the Court of Appeals. App. A at 1a-8a.[1] Petitioners' "Statement of Facts" and review of the proceedings below correctly recite the length of trial (June 6, 1977 through August 23, 1977), the nature of the jury's 15 special verdicts and the amount of the judgment. Otherwise, the Petition selectively incorporates evidence and inferences previously argued and rejected and in many instances omits facts which have previously proved painful to Petitioners' cause. In some instances, Petitioners' factual recitation is simply wrong.

A brief, factual overview will serve to reveal how the relevant market came into being and the nature of the antitrust violations involved.

[1] Appendix references are to Appendix A of Petitioners' appendices to Petition for Writ of Certiorari (the Opinion of the Court of Appeals), or the Joint Appendix (CA App.).

In 1966, Grumman American Corporation commenced to manufacture and sell the Gulfstream II (G-II), a business aircraft, which was larger, had greater range (transoceanic), and required substantially more sophisticated and expensive avionics than any produced before or since. App. A at 3a-4a. Grumman American did not install avionics in its "green" aircraft. App. A at 2a. Thus, the introduction of the G-II created a clear business opportunity for those few companies with the technical and financial resources and know-how to enter this new marketplace. Respondent, Associated Radio Service Company, elected to gain such an entry.

After contracting for avionic installations in some of the early G-IIs, Associated sought to enhance its profitability by entering into a sales representation agreement with Petitioner, Page Airways, Inc., in 1968. App. A at 4a.

Avionics in G-II aircraft is a unique, highly sophisticated electronics system by which a pilot operates the aircraft. This avionics system is composed of flight control, navigation and communication subsystems, which subsystems must be designed and installed to function or interface with each other and other systems in the G-II. App. A at 2a n.3. Each competing installer designed and obtained certifications of airworthiness from the Federal Aviation Administration after lengthy analysis and testing of the G-II avionics system before being able to offer it for sale. App. A at 5a. An avionics system designed for use in any other aircraft is unusable in a G-II. App. A at 3a-4a. Only ten companies have ever competed for G-II avionics business. The number of companies able to compete effectively for G-II outfitting contracts dwindled from eight or nine in 1968 to about five in 1977. App. A at 4a-5a.

Prior to August, 1973, the entry barriers into the G-II avionics market were significant. Unusual hangar facilities, complex engineering studies and drawings, FAA licensing of the facility (including its employees, operations and quality control

its contract with Associated expired, and Petitioners decided to do so at least as early as 1971. App. A at 6a. Petitioners did not have a sufficiently large hangar, G-II avionics system engineering, experienced personnel, FAA certification, or any other qualifications to commend it to a potential customer. Therefore, through a series of predatory acts calculated to destroy Associated, the most significant competitor, Petitioners commenced their drive to enter and dominate the market. They succeeded. App. A at 6a-8a, 18a-19a.

Prior to August 1973, Associated had about 51% of the G-II avionics market and was the most significant competitor. App. A at 5a n. 6, 18a n. 18. Petitioners literally eliminated Associated as a competitor in August 1973. Associated's market share went from 51% to 0%. For approximately one year thereafter, Associated did not have the physical or financial capability to offer even minimal competition. Petitioners acquired over 10% of the market during the last three months of 1973, 50% of the market in 1974, and by trial time had 64%. App. A at 5a n. 6, 18a. Petitioners found bribery of customers and Grumman employees to be an effective method of foreclosing portions of the market to the competition. App. A at 6a-8a. During this same time the number and vitality of the competitors decreased (App. A at 4a-5a), and the price of G-II avionics installation substantially increased, as did Gulfstream's profits. App. A at 18a n. 19. The ranks of the competitors were reduced, and those remaining were relegated to a bare subsistence volume of business that can reasonably be anticipated in a market controlled by a monopolist. App. A at 4a, 5a n. 6.

REASONS FOR DENYING THE WRIT

I.

THE MARKET DEFINITION INSTRUCTIONS IN THIS CASE ARE CONSISTENT WITH ESTABLISHED SUPREME COURT AUTHORITY AND WITH THE VERY INSTRUCTIONS REPEATEDLY REQUESTED BY PETITIONERS

This Court's longstanding and sound analysis in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) of the practical indicia to be taken into account in making a determination of relevant product market in antitrust cases should not be disturbed. Nevertheless, Petitioners now attack the market determination methodology of *Brown Shoe* because it allegedly "does not provide adequate or proper guidance to a factfinder" (Petition, p. 11), and call upon this Court to take a "much needed step toward clarifying a muddled area of antitrust law" (Petition, p. 19). Petitioners ignore the fact that the Court has been proffered similar, identical opportunities in the past. *See, e.g., Heatransfer Corp.* v. *Volkswagenwerk, A. G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Petitioners also ignore the fact that *all* parties, as well as the trial court and the Court of Appeals were convinced that *Brown Shoe* standards applied in this case, and Petitioners never before found the law "muddled" until faced with the unequivocal jury verdict and judgment herein. Such a result-oriented plea should not now be heard.

Petitioners' attack upon the trial court's *Brown Shoe* jury charge attempts to distract this Court's attention from the propriety of the trial court's instructions, and conceals the fact that the market definition hypothesis now posited by Petitioners is totally at odds with the very jury instructions which they repeatedly requested and which were substantially adopted by

the trial court. Even if the trial court erred in basing its market definition instruction on the relevant factors discussed in *Brown Shoe* (which it did not), it would have been an error invited by Petitioners' own requested charge, and therefore one which they should be barred from relying upon now.[2]

On July 29, 1977, Petitioners filed a proposed jury charge, basing product market delineation on flexibility of production facilities, while ignoring the various other *Brown Shoe* factors (CA App. at 2392-3). The court rejected this version which, as worded, would have been equivalent to granting a directed verdict for Petitioners (CA App. at 2515). On August 9, 1977, Petitioners objected to the court's preliminary draft charge (CA App. at 2533), and submitted a more detailed requested market instruction, including reference to all seven of the *Brown Shoe* market criteria (CA App. at 2518-27).

The August 9 request is significant in two respects. First, it became Petitioners' "bible" as to the market issue, insisted upon by them in their obfuscated objections to the preliminary charge (CA App. at 2533), then in their August 22, 1977 objections to the court's third draft charge (CA App. at 2573), and finally in their October 17, 1977 motion for new trial (CA App. at 2639). Secondly, the contents of the proposed August 9 market instruction reveal the extent to which their consistent endorsement of the *Brown Shoe* criteria has now changed, chameleon-like, in their desire to overcome the effects of their own request. In their requested instruction Petitioners enumerated the various *Brown Shoe* indicia including, with no particular emphasis, production facility flexibility:

---

[2] A party who has requested an instruction has invited any error in it and cannot complain if the instruction, or one substantially like it, is given. Wright & Miller, *Federal Practice and Procedure:* Civil §2558 (1971) at 675, and cases cited therein. *See also Glasscock* v. *Wilson Constructors, Inc.*, 627 F.2d 1065 (10th Cir. 1980); *Trawick* v. *Manhattan Life Insurance Co.*, 484 F.2d 535 (5th Cir. 1973); *Solomon Dehydrating Co.* v. *Guyton*, 294 F.2d 439 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961).

> If, on the other hand, you find that the installation of avionic and electronic equipment on a Grumman G-II does not have peculiar characteristics and does not require unique productions facilities as compared to such installation in other aircraft, particularly other large corporate, private, and governmental aircraft, then this is *some evidence* that the installation of electronic and avionic equipment in Grumman G-II's is not the relevant submarket for purposes of this antitrust case. [CA App. at 2520] [Emphasis supplied].

Significantly, in summarizing the indicia, Petitioners asked that the jury be instructed:

> In making this decision, I caution you that *none of the seven indicators of a submarket are more important than the others*. The existence or non-existence of one indicator is not determinative. . . . Furthermore, some of the indicators may suggest a submarket of one scope and other of the indicators suggest a submarket of a larger or smaller scope. You must, therefore, examine *all* of the indicators and decide after weighing *all* of them whether or not a submarket exists, and, if so, the boundaries of that submarket. [CA App. at 2525]. [Emphasis supplied].

In stark contrast to the requested charge, Petitioners now assert for the first time that a *Brown Shoe* relevant product market instruction is totally inadequate (1) unless it informs the jury that two criteria (selected by Petitioners) are more important than all the others, and that the remainder are merely evidentiary of the basic two (Petition, p. 12); and (2) unless it informs the jury that the "central issue" in the case is supplier substitutability (Petition, p. 13, 14); and (3) unless it instructs the jury on the respective weight to be given the relevant factors (Petition, p. 15); and, completing Petitioners' turnabout, (4) unless the jury is instructed that *Brown Shoe's* indicia are of *varying importance* (Petition, p. 16).

Thus, Petitioners, now realizing that their only favorable evidence pertained to production facility flexibility (now called supplier substitutability), seek to elevate that factor to controlling significance. Petitioners' contention fails for three reasons: (1) it is an incorrect statement of the law, completely at odds with this court's decision in *Brown Shoe* and its progeny. *See, e.g., Heatransfer Corp., supra; Pacific Coast Agricultural Export Association, supra*; (2) it contradicts the very market instruction they repeatedly demanded; and (3) it ignores the fact that even the single market definition criterion Petitioners rely on was a fiercely controverted factual issue.[3] Enforcing the jury's finding, the Court of Appeals listed some of the evidence supporting Respondent's position. App. A at 10a. Petitioners themselves concede the presence of additional record evidence contradicting their assertion of production facility flexibility (Petition, p. 14).

Petitioners present concentration upon the single index of production facility flexibility is predictable in view of the absence of evidence favorable to them under the other *Brown Shoe* criteria. However, the trial court clearly instructed the jury that the factors of uniqueness of production facilities and specialized vendors must be considered by them, along with other specified factors, in reaching their conclusion. Petitioners' assertion (Petition, p. 16) that a lay jury would not understand a *Brown Shoe* instruction because they were unfamiliar with the legal and economic concepts involved, ignores the fact that the jury had the benefit of eleven weeks of evidentiary presentations along with detailed instructions from the trial court and the arguments of counsel to supplement their understanding of the

[3] Relevant market has been unequivocally recognized as being a question of fact heavily dependent on the characteristics of the particular industry involved. *See Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

issues involved. Unfortunately for Petitioners, the jury's understanding of the issues resulted in answers adverse to Petitioners on all special interrogatories submitted. No court has held that flexibility of production facilities is dispositive of the relevant product market issue as a matter of law.

Petitioners' requested relevant product market instruction has been further abandoned and a contrary concept proposed to this Court in another important respect. Petitioners now write off the "user substitutability" factor as wholly insignificant in the market definition determination, inasmuch as the owner of a G-II aircraft obviously needs G-II avionics (Petition, p. 13). Petitioners' admission does *not* eliminate the significance of user substitutability as a consideration, but, quite the contrary, conclusively establishes this factor in favor of the market found by the jury. Moreover, Petitioners now contradict the applicable instruction they repeatedly sought at trial, which was as follows:

> . . . in one sense, the customer for the installation of such equipment in a Grumman G-II aircraft will always be distinct because he must be the owner of a G-II aircraft. However, that fact does not, for purposes of this case, solve the problem. Rather, the issue is whether or not the customer who purchases a G-II aircraft and therefore must have such installations performed is somehow distinct or different from the customer who purchases another type of aircraft, particularly other large corporate private, or governmental aircraft. [CA App. at 2521].

Respondent respectfully submits that the trial court's relevant product market definition was in accordance with this Court's formulation in *Brown Shoe*, and with the very jury instructions which Petitioners requested, but now disavow. Consequently, such instructions do not form a proper basis for review.

II.

THE JURY INSTRUCTION ON VIOLATION OF SECTION 1 OF THE SHERMAN ACT APPROVED BY THE FIFTH CIRCUIT IS ADEQUATE TO MEET THE "INJURY TO COMPETITION" TEST AND IS NOT IN CONFLICT WITH JURY INSTRUCTIONS PREVAILING IN OTHER CIRCUITS. FURTHER, THE PORTION OF THE INSTRUCTIONS NOW ATTACKED BY PETITIONERS WERE GIVEN IN SUBSTANTIALLY THE FORM THEY REQUESTED.

Petitioners erroneously contend that the Court of Appeals approved the trial court's judgment without any showing of an injury to competition. To the contrary the Court of Appeals unequivocally "held that there were significant and more-than-temporary harmful effects on competition, shown in part by the rise in prices charged to customers and the rise in Page's profits over the profits Associated took." App. A at 21a. Petitioners, realizing that injury to competition was shown, now attack the sufficiency of the instructions on the "rule of reason" test of illegality.

In so doing, Petitioners posit a specious instructional conflict among the Circuits which conveniently ignores that the instructions given by the trial court were substantially similar to those requested by Petitioners.[4] Thus, Petitioners have failed to

---

[4] Petitioners asked the trial court to give their requested instruction No. 3, submitted August 9, 1977 (CA App. at 2528). This request states in pertinent part:

> . . . On the contrary, the purpose of the act was to prohibit those restraints of trade which are *reasonably calculated to prejudice the interest of the public,* that is, the interest of the buyers or consumers of the product or service in question.
>
> The injury, if any, suffered by the Plaintiffs, Associated Radio Co. and Associated Radio Service Co., is a private injury which is not necessarily the type of injury which *tends to or is reasonably calculated to injure the buyers of installation services in the relevant market.* [CA App. at 2528]. See footnote 2 above.

preserve the point which they now assert.[5]

What Petitioners now claim to be splits of authority among the Circuits are at most different articulations of the same standard. While the Circuits' articulations of injury to competition may vary in the differing contexts of the individual cases and records, which necessarily involve different degrees of "impact" on competition underlying antitrust liability, no conflict between Circuits exists.

The cases cited by Petitioners from other Courts of Appeal which allegedly conflict with the "rule of reason" instructions in this case are not in conflict.[6] In each of these cases the Court of Appeals held that a plaintiff who alleges unfair competition must prove injury to competition. This is the identical holding of the Court of Appeals in this case.[7]

Thus the Fifth Circuit has not adopted a unique test for determining when acts of unfair competition violate the antitrust

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[5] Petitioners' objections to the charge at trial (CA App. at 2572-73) did not have the specificity required by Rule 51, Federal Rules of Civil Procedure, to afford the trial court an opportunity to correct the alleged error in the instructions now being asserted. *Wilson* v. *Crouse-Hinds Co.*, 556 F.2d 870 (8th Cir.), *cert. denied*, 434 U.S. 968 (1977); *Delancey* v. *Motichek Towing Service, Inc.*, 427 F.2d 897 (5th Cir. 1970).

[6] Petition, p. 23, n. 30. To the contrary, the Court in *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir.), *cert. denied*, 101 S.Ct. 571 (1980), relied upon by Petitioners, held that the burden of showing public injury may be met by evidence that defendant's conduct tended to or was reasonably calculated to prejudice the public interest. The court approved an instruction which contained identical language given in the instant case, to-wit: "tends or is reasonably calculated to prejudice the public interest." 624 F.2d at 810.

[7] These cases, as well as the instant case, make clear that the *Pick-Barth* [*Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932)] *per se* doctrine is not to apply and that a plaintiff who alleges unfair competition must prove injury to competition. App. A at 13a-14a.

laws. The Court of Appeals follows the rule that injury to competition must be shown and, after careful consideration of Petitioners' challenge, held that the charge was adequate to withstand the objections. App. A at 20a. The test announced by the Court of Appeals is not in conflict with a decision of this Court or of another Court of Appeals on the same matter and provides no legitimate basis for the exercise of this Court's power of review.

Finally the instant case is hardly an appropriate one to review semantic differences in jury instructions on injury to competition in view of the Fifth Circuit's finding of overwhelming evidence of such injury. App. A at 12a-20a. Such a clarification is even more inappropriate in view of the limited scope of Fifth Circuit's holding:

> This opinion should not be read to encourage all who suffer injury to business or property through an alleged business tort to bring suit under section 1 or 2 of the Sherman Act. *The holding of this case rests on a narrow foundation, and only those cases coming within the ambit of these particular facts should be considered.* (Emphasis supplied) App. A at 30a.

III.

THE JURY INSTRUCTIONS ABOUT WHICH PETITIONERS NOW COMPLAIN CONCERNING LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT WERE SUBSTANTIALLY THOSE REQUESTED BY PETITIONERS. THESE INSTRUCTIONS WERE LEGALLY CORRECT.

Petitioners' third question presented for review is made contingent upon this Court's granting the Petition on one of the first two questions presented (Petition, p. 27). The trial court's instructions pertaining to Section 2 of the Sherman Act (set out at length in the Fifth Circuit's opinion) were thorough and correct. Petitioners now assert that the jury should have been asked to make a fact finding as to each instance of predatory conduct

supporting Respondent's Section 2 claims and represent that they had proposed just such jury interrogatories. (Petition, p. 28, n. 40) In fact, no such interrogatories concerning Section 2 were ever proposed.

Petitioners' requested special interrogatories were grouped into those pertaining to alleged violations of Section 1 (Interrogatories 2-7) (CA App. 2470-97), and those pertaining to alleged violations of Section 2 (Interrogatories 11-19) (CA App. 2501-09). In each of these separate groupings, Petitioners clustered their proposed interrogatories as to liability, proximate causation and amount of damages with respect to the particular Sherman Act section allegedly violated.

Significantly, Petitioners' only requested special interrogatory addressing the commission of specific unfair acts (Special Interrogatory No. 4; CA App. 2472-92) was requested in connection with Section 1, and *not* in connection with Section 2. This is confirmed by the wording of their proposed Special Interrogatory No. 5 (CA App. 2493) wherein, as a follow-up to the preceding interrogatory, Petitioners requested that the jury determine, as to each of the acts which they found had been committed, whether each "unreasonably restrained competition." No such "laundry list" of issues was *ever* requested by Petitioners in relation to the alleged violation of Section 2. Rather, in their requested instruction to Special Interrogatory No. 11, Petitioners themselves asked that the jury be generally instructed that the definition of monopoly power is the ability to control prices and exclude competition (CA App. at 2460-1), and that, should Petitioners be found to have such power, even then no offense would result if such power were acquired by a lawful concentration of legitimate sales effort in the business monopolized.

The Court's actual Section 2 instructions (quoted by the Court of Appeals at App. A, p. 25a-28a) are remarkably similar to those requested by Petitioners, cautioning the jury that mere

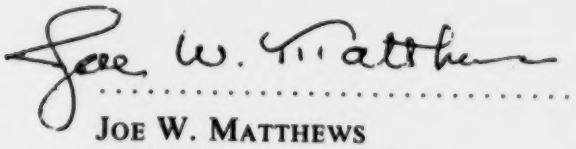
possession of monopoly power is insufficient to find an antitrust violation, where it is acquired by virtue of a superior product or business acumen, and is achieved through purely legitimate means. *See United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). Again, Petitioners cannot be heard to attack the sufficiency of jury instructions substantially identical to those they requested, and which were totally correct.[8] Nor can they now legitimately complain about the lack of an instruction that they never requested.

[8] See footnote 2 above.

CONCLUSION

This case was correctly decided on the facts and law in the lower courts. The questions presented by the petition, taken individually or as a whole, provide no basis for the exercise of this Court's powers of review, and the petition for a writ of certiorari should accordingly be denied.

Respectfully submitted:



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MAR 13 1981
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PAGE AIRWAYS, INC., *et al.*,
Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,
Respondent.

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1980

No. 80-1304

PAGE AIRWAYS, INC., *et al.*,
Petitioners,

v.

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Respondent.

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent Associated does not deny the importance of the antitrust questions presented in the Petition for Certiorari. Instead, Associated asserts that Page has waived its right to raise these legal objections. According to Associated, Page tried to convince the trial judge to give jury instructions that are substantially the same as those to which Page now objects. However, as we show below, the issues presented in the Petition are not last-minute contrivances of counsel; they are, in fact, the basic legal propositions upon which Page has insisted from the beginning of this litigation. The trial judge and the Court of Appeals were fully informed of the legal positions Page was asserting, and these positions were rejected as a matter of law by the lower courts. Accord-

ingly, the issues set forth in the Petition are properly before this Court and are ripe for resolution.[1]

I. *Market Definition Issue*

Although Associated asserts in passing that the market definition instruction below was correct because it incorporated language from this Court's *Brown Shoe* opinion,[2] the Response does not deny that the issues presented in the Petition are important ones deserving resolution by this Court. In particular, the Response does not deny that *Brown Shoe's* listing of potentially relevant market definition criteria has frequently led lower courts, as in this case, to give instructions that simply parrot the list and make no attempt to indicate the economically crucial issues pertinent to the case at hand.[3] Instead, the Re-

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[1] Associated also accuses Page of misstating the facts. While we reject that accusation, we do not go into the matter here. This case turns on significant questions of law, not disputed issues of fact. We note, however, that Associated does not even attempt to document its assertion that Page's factual recitation is wrong.

[2] *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

[3] Associated suggests that Page is exaggerating the significance of supplier substitutability and that its view is at odds with "*Brown Shoe* and its progency," citing only *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) and *Pacific Coast Agricultural Export Ass'n.* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Response at 8. Associated, however, completely ignores footnote 42 of *Brown Shoe* and all the cases that hold that where a high degree of supply/production substitutability exists, the relevant market must include all the interchangeable products. *See* Petition at 10-13, n. 11 and n. 14. Instead, Associates, selects for citation (without discussion) two totally inapposite cases. In *Heatransfer*, the jury was explicitly told to consider questions of production substitutability, framed in the context of the facts at issue therein, Charge to the Jury at 32-35, *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 1975-1 Trade Cas. ¶ 60,309 (S.D. Tex., April 25, 1975), and therefore the adequacy of the jury charge was not challenged in either the Court

sponse asserts that, however important the issues might be, they are not properly presented in this case.

This assertion is flatly wrong. Page did all it is required to do—and more—to preserve the issues set forth in the Petition. Under Rule 51 of the Federal Rules of Civil Procedure, a party may challenge an error or omission in a jury instruction as long as he has objected to the instruction at issue, stating his objection with sufficient specificity "to inform the trial judge of possible errors so that he may have an opportunity to correct them." 5A Moore's Federal Practice ¶ 51.04 at 51-30 to 51-35 (2d ed. 1948). *See, e.g., Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943); *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 470 (9th Cir. 1977); *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 122 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973). A party need not propose a perfect instruction; all that is required is that, either through proposed instructions or specific objections, the party make its legal position clear so that the judge has an opportunity to make an informed decision. *Sunkist Growers Inc.* v. *Winkler & Smith Citrus Products Co.*, 370 U.S. 19, 26-27 (1962); *Florists' Nationwide Telephone Delivery Network* v. *Florists' Telegraph Delivery Assn.*, 371 F.2d 263, 270 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967). *See also* 5A Moore's Federal Practice ¶ 51.04 at 51-28 (2d ed. 1948).[4]

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of Appeals or the Petition for a Writ of Certiorari. Similarly, in *Pacific Coast Agricultural Export Ass'n.*, there was no dispute regarding user and supplier substitutability or the adequacy of the market instruction; the issue was simply whether plaintiff had charged defendant with monopolizing the production market or the distribution market.

[4] Even where a party initially offers erroneous instructions to the court, he can challenge those instructions on appeal if he recognized the error and sought to rectify it by filing an objection before the jury retired. *See, e.g., General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147, 1154 (7th Cir. 1978); *Alabama Great S. R.R.* v. *Johnson*, 140 F.2d 968, 972 (5th Cir. 1944); *See also* Wright and Miller, *Federal Practice and Procedure: Civil*, § 2558, at 675-76 (1971).

Page could hardly have made its position clearer in this case. It stressed repeatedly that instructions that failed to emphasize the crucial importance of supplier substitutability and that simply recited the *Brown Shoe* factors were inadequate. Page's proposed charge of July 29, 1977, submitted prior to the close of the evidence, focused exclusively on supplier substitutability:

> Therefore, in this case the 'relevant product or service market' concerns that group of aircraft outfitters who either compete with Page and Associated Radio Service Company and each other, or who are capable of so competing, if they desired to obtain contracts, for the complete installation of avionics in Grumman G-II aircraft. The test of whether or not a given outfitter is in the 'market' is not whether he has actually ever done any G-II work or not; the test is whether he is an available substitute who could do the work if those presently doing it should raise their prices unreasonably or otherwise act in an unreasonable manner so as to cause the G-II owner to shop around for someone else to do his work. CA App. at 2392.[5]

Page cited two cases in support of this requested instruction, both supplier substitutability cases.[6] Significantly, Page did not cite *Brown Shoe* or mention the *Brown Shoe* factors.

It was the judge who first utilized the *Brown Shoe* factors, incorporating them in his August 5 proposal, CA App. 2514-A to 2514-G, and Page tried hard to point out the inadequacies of this approach. Responding to the judge's introduction of the submarket concept, Page objected:

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[5] Appendix references are to the Joint Appendix in the Court of Appeals (CA App.) or to Appendix A of the Appendices to Petition for a Writ of Certiorari (App. A).

[6] *Telex Corp.* v. *IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *Yoder Bros., Inc.*, v. *California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). *See* CA App. at 2393.

> Defendants submit that the description of the legal requirements for a sub-market are incomprehensible and wholly insufficient to permit the jury to understand the concept involved. Moreover, the Defendants submit that there is insufficient evidence of any sub-market and object to the charge in that regard.[7]

Responding to the judge's confused attempt to deal with supplier substitutability, Page noted:

> The issue is not as posed on page 27 whether an outfitting company that specializes in one aircraft would be interested in switching to another aircraft, but rather, under the applicable law, the issue is whether such an outfitter reasonably could switch to providing service in a different aircraft.[8]

Having made its legal position abundantly clear, Page nevertheless had to protect itself should the trial judge persist in his errors. Page accordingly proposed an alternative on August 9, "without in any way waiving [its] previous requests in [the July 29] proposed charge." CA App. at 2518. This alternative, essentially a variation on the theme established by the judge, employed the *Brown Shoe* factors; but it emphasized looking "at the production side" and incorporated almost verbatim, as the concluding few paragraphs, Page's July 29 supplier substitutability instruction. CA App. at 2518-27.

When the judge ultimately gave up his attempt to go beyond *Brown Shoe* and decided simply to recite the abstract *Brown Shoe* factors, Page objected vehemently: "Defendants object to Instruction No. 39 [the instruction ultimately given] because, as drafted, it is wholly meaningless and confusing in that it fails to define the considerations which go into determining the relevant market in any way which may be understood by the jury." CA

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[7] Defendants' Response and Objections to Preliminary Jury Charge (August 9, 1977) at 13-14.

[8] *Id.* at 15, CA App. at 2534.

App. at 2573. Page requested that the judge either adopt Page's requested charge of August 9 or go back to his earlier proposed charge, both of which dealt specifically with supplier substitutability. *Id.* The judge refused.

In light of these efforts, it is hard to imagine how Page could have made clearer to the judge its belief that his market definition instruction was inadequate or could have given him a greater number of opportunities to correct the deficiencies.[9] No more was required.

Thus, Associated's assertion that Page's legal arguments on supplier substitutability are an afterthought, made in view of Page's alleged failure to submit sufficient evidence on other supposedly relevant factors (Response at 8-9), is wrong on all counts. Page always contended—as the Petition now argues—that supplier substitutability should have been the crucial issue on the facts of this case, and that in any event a boiler-plate listing (without more) of all the factors mentioned in *Brown Shoe* provided inadequate guidance to the jury. That issue is properly presented and deserves resolution by this Court.

II. *Restraint of Trade Issue*

Associated next argues that since the Fifth Circuit rejected the *Pick-Barth per se* standard and purported to require some assessment of the impact of Page's actions on competition, there is no real conflict among the Circuits. But Associated ignores the Fifth Circuit's unique two-part test for "unfair competition cases under section 1 of the Sherman Act." App. A at 16a; 624 F.2d at 1351. That test, as the Petition points out, requires proof

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[9] It should be noted that Page's Motions for a Directed Verdict, based *inter alia* on the fact that supplier substitutability dictated a broader market than Plaintiffs were proposing, also alerted the trial judge to Page's legal position. *See* CA App. at 2362 and 2538.

of only a potential impact upon competition. The test is fundamentally different from the test prevailing in other Circuits under which plaintiffs must show an actual, often substantial, adverse effect. *See* Petition at 23, n.30.[10]

Associated further claims (as it did in relation to the market definition issue) that Page has failed to preserve its right to object to this error. Associated contends that the instructions given by the trial court on this issue were "substantially similar" to those requested by Page and thus any errors in them were invited. The contention is false.

In support of its argument, Associated quotes two sentences from Page's proposed charge of August 9. Response at 10, n. 4. But these two sentences cannot be read in isolation. The rest of the proposed instruction—*i.e.*, the next four paragraphs—clearly would have required that the jury find actual injury to competition.[11] Moreover, from its first motion to dismiss this case, Page

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[10] Associated discusses only one of the five cases described in footnote 30. That case, *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir.), *cert. denied*, 101 S. Ct. 571 (1980), does not support Associated's position. There, the court specifically held that "[a]n adverse effect upon competition, however small, is the distinguishing characteristic of a restraint of trade in contrast to a business tort. . . . Plaintiffs must show [for a restraint of trade] that the 'effect upon competition in the marketplace is substantially adverse.'" 624 F.2d at 810-11. Respondent does not even attempt to document its conclusory assertion that the four other cases described in footnote 30, representing four other Circuits, do not conflict with the present case.

[11] These paragraphs would have required the jury to "consider whether the level of competition then existing was diminished" by the challenged conduct. CA App. at 2529. They would have specifically instructed the jury that merely substituting one competitor for another, while possibly injurious to the displaced competitor, did not by itself constitute injury to competition. Further, they would have focused the jury's attention on crucial questions of price and service competition. CA App. at 2528-30.

had been insisting that only actual injury to competition constituted a violation of section one of the Sherman Act.[12] Thus, to the extent that there was ambiguity in Page's August 9 proposal, it could not have misled the judge as to Page's position.

In reality, the chronology suggests that it was Associated (not Page itself) who proposed that the judge insert the language to which Page objects. In his proposed charge of August 18, the judge had adopted the last four paragraphs of Page's August 9 proposed charge, *i.e.*, the paragraphs that directed the jury to look for an actual adverse effect on competition. He did not include the "tendency" language Associated quotes from Page's August 9 proposal. It was Associated who, arguing that Page had "successfully led this Court down the path of error," CA App. at 2562, urged the judge to go back to an earlier version and specifically to insert the "tendency" language that ultimately appeared in the jury charge.[13]

But without regard for where the "tendency" language originated, the significant fact is that after the judge retreated and dropped Page's suggestions to look at actual injury, Page's objections to the judge's final jury charge could not have been clearer or more direct:

> Instruction No. 37 waters down the "restraint effect" requirement to mean merely "*tending to*," whereas Plaintiffs' burden is to show that an unreasonable restraint *actually occurred.* CA App. at 2572 (emphasis added).

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[12] *See* the Motions to Dismiss and Motions for a Directed Verdict at CA App. at 2019, 2243, 2274, 2362, 2538.

[13] Associated proposed that the judge add the following language:

> Before it can be said that the conduct of the Defendants is forbidden as unreasonably restraining trade or commerce within the meaning of the Sherman Act, it must appear that such *conduct tends or is reasonably calculated to prejudice the public interest.* CA App. at 2562 (emphasis added).

Page further objected to the fact that the court had "wholly ignored the requirement [that the] 'test of antitrust legality of such a restraint is whether *the effect upon competition in the market place is substantially adverse.*'" CA App. at 2573 (emphasis in original), quoting a Fifth Circuit case.[14]

Thus, from its first motion to dismiss, through its motions for a directed verdict, until its final effort to help the judge frame an adequate instruction, Page had made it abundantly clear that antitrust liability requires evidence of an actual adverse impact on competition, not a mere tendency or potential to hurt competition. This issue, like the market definition issue, was properly preserved. It can and should be resolved by this Court.

III. *Section Two Issue*

The Petition's Section Two issue is straightforward. The Court of Appeals found that Page's alleged bad acts, "taken together," constituted sufficient evidence to support liability under Section Two; each of the individual acts would not alone have been enough. The Court, however, overlooked the fact that the jury may have found that Page only committed one or two of the bad acts and nevertheless found liability. That being so, it was clearly error to affirm. Page pointed out this error to the Court of Appeals in the first and only opportunity it had to do so, the Petition for Rehearing and Suggestion for Rehearing En Banc, at 20-22. While this error may not by

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[14] Page specifically objected to the court's elimination of the instructions that indicated that injury to Plaintiffs did not necessarily constitute injury to competition and that no unreasonable restraint results (1) if the level of competition in the relevant market remained the same or increased or (2) if the only result of the defendants' actions was the substitution of a new competitor for an existing one. CA App. at 2573.

itself warrant the issuance of a Writ of Certiorari, we urge this Court, if it grants the Petition, to require the Court of Appeals to correct its obvious mistake.[15]

CONCLUSION

For the reasons set forth above and in the Petition, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[15] Some of Page's suggested jury interrogatories, rejected by the trial court, were addressed to the occurrence *vel non* of each bad act. Had the interrogatories been submitted, the Court of Appeals could have ascertained on what factual basis the jury's verdict rested. The fact that the interrogatories were proffered in the context of Section One interrogatories is irrelevant. If they had been asked and answered, the Fifth Circuit would have been able to tell whether, on its view of the law, the jury verdict was supportable. As it is, no such conclusion is possible.